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ABSTRACT

This hearing transcript concerns the current status of the Federal enforcement of laws providing for equal opportunity in education. In December 1988, the Committee on Education and Labor issued a report on the civil rights enforcement activities of regional offices of the Office for Civil Rights (OCR). Its findings indicated that there was a deliberate and effective system by which OCR failed to enforce the civil rights laws according to its mandate. In general, the report found that the agency has not vigorously enforced laws protecting the rights of women and minorities since 1981. This hearing is based on evidence collected subsequently to determine the state of laws providing for equal opportunity in education as of November 1989. Acting Assistant Secretary, Office for Civil Rights William Smith and Acting Civil Rights Assistant Attorney General James P. Turner both make statements concerning the enforcement of civil rights laws. In addition, experts on civil rights issues and education who have monitored the Bush Administration and its predecessors provide testimony regarding the following issues: (1) the resegregation of public schools; (2) racial tensions on college campuses; (3) parental choice of schools; (4) the Bush Administration's educational policies; (5) budget concerns; and (6) government enforcement of the civil rights laws. One figure and 24 tables are included. (JS)

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HEARING ON THE FEDERAL ENFORCEMENT OF EQUAL EDUCATION OPPORTUNITY LAWS

ED322254

HEARING

BEFORE THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, NOVEMBER 28, 1989

Serial No. 101-73

Printed for the use of the Committee on Education and Labor

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HEARING ON THE FEDERAL ENFORCEMENT OF EQUAL EDUCATION OPPORTUNITY LAWS

TUESDAY, NOVEMBER 28, 1989

House of Representatives,
Committee on Education and Labor,
Washington, DC.

The committee met, pursuant to call, at 9:30 a.m., in Room 2175, The Rayburn House Office Building, Hon. Major R. Owens presiding.

Members present: Representatives Hawkins, Owens, Hayes, Payne, Lowey, and Smith of Vermont.

Staff present: Shirley J. Wilcher, associate counsel; John W. Smith, special assistant to the chairman; Ricardo Martinez, legislative analyst; Jo-Marie St. Martin, minority education counsel; and Kathy Marshall, minority professional staff member.

Chairman Owens. The Committee on Education and Labor will come to order.

This morning the Education and Labor Committee is convening this oversight hearing in order to ascertain the current status of the Federal enforcement of laws providing for equal opportunity in education.

These statutes include Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973. The Office for Civil Rights of the U.S. Department of Education and the Department of Justice, Civil Rights Division, are the agencies primarily responsible for the enforcement of these laws.

In December 1988, the committee issued a report prepared by the majority staff, concerning the civil rights enforcement activities of the Office for Civil Rights. Committee staff visited six of the ten regional offices of OCR, interviewing most of the enforcement and legal staffs of those offices.

What they found was an apparently deliberate and very effective system by which OCR adamantly failed to enforce the civil rights laws according to its mandate.

The committee staff investigated several facets of OCR's operations and policies including: The development and dissemination of enforcement policies; the use of letters of dissemination of enforcement policies; the use of letters of findings, particularly in cases in which a violation of the civil rights laws has been found; monitoring of agreements once a settlement is obtained between OCR and the school district or college/university; the agency's policies and practices regarding technical assistance; the status of its quality assurance program; and the impact of the *Grove City College* v. *Bell* and *Adams* v. *Bennett* decisions upon case processing.

The findings included in the staff report were highly critical of the policies and practices of this agency. In general, the report found that the agency has not vigorously enforced laws protecting the rights of women and minorities since 1981.

These findings mirror testimony given before the House Government Operations Committee and the Judiciary Committee in 1982, 1985, and 1987 regarding the failure of the previous administration to enforce the civil rights laws regarding equal education opportunity.

Recent reports that our nation's public schools are becoming re-segregated, and that racial tensions on our college campuses are intensifying, have made this committee even more concerned about the enforcement of civil rights laws. We will hear testimony addressing both of these problems today. We are also concerned that this administration's policies regarding parental choice may seriously exacerbate the twin problems of segregation and re-segregation.

Lastly, we know that by the year 2000, the majority of new entrants to the labor force will be women and minorities, and that the minority, female and disabled school children of today will be critical to this nation's economic survival in the next century.

Therefore, equal education opportunity is not only a moral imperative, it is a matter of national security.

When candidate George Bush included as an integral part of his platform the improvement of our Nation's educational systems, many of us had high hopes that his administration would reverse the educational disgraces of the Reagan Administration. When the President's education budget was revealed, we were disheartened.

When the $166 billion S&L bailout was pushed through Congress we were angry because we knew that the massive flow of money into this bottomless pit meant that we would have no meaningful increases in education or other domestic appropriations for a long time. Now, we have yet another signal of President George Bush's true commitment to education.

After almost one year in office, there seems to have been no substantive efforts to improve OCR's dismal enforcement record, and there has not even been a nomination for permanent assistant secretaries of civil rights enforcement in either the Department of Education, or the Department of Justice. Apparently, ensuring equal education opportunity for all American children is not very high on our Education President's list of priorities.

Today, we will hear from OCR Acting Assistant Secretary William Smith and Acting Civil Rights Assistant Attorney General James P. Turner.

We will also hear from a stellar group of experts who have monitored this administration and its predecessors and will provide excellent testimony regarding the issues before us. On behalf of the committee, I wish to thank the witnesses for appearing before us today, and for taking their time to enlighten us regarding the critical issue of equal education opportunity law enforcement.

I yield to Mr. Hawkins for an opening statement.

Mr. Hawkins. I have no opening statement, Mr. Chairman. The Secretary of Education before this committee did make a strong commitment that he would not tolerate a lack of enforcement of civil rights.

So, I commend you on conducting these hearings. If the hearings reveal that there is a lack of enforcement of civil rights, I think we should recall the Secretary of Education before the committee to make good on his commitment. I think we should take it in good faith.

I certainly hope that these hearings will certainly prove whether or not there is really enforcement of civil rights and whether or not we are just engaging in a lot of rhetoric.

Thank you.

Chairman **Owens.** Mr. Payne.

Mr. **Payne.** Thank you, Mr. Chairman.

I want to take this opportunity to thank you for bringing these distinguished panelists before us today in order to address the administration of the Department of Education of the Office for Civil Rights. The committee's initial investigation of the Office for Civil Rights occurred before I was elected to Congress.

I am honored to be a participant of today's hearing. I must commend the Education and Labor Committee of the 100th Congress for exercising its oversight authority to examine the extent to which the Office for Civil rights was carrying out its mandate in keeping with the intent of Congress.

As a former teacher, a civil libertarian and a Member of Congress, I am committed to working toward the eradication of discrimination in education.

Therefore, I am anxious to hear the response of the government representatives and other interested persons to the findings of the committee staff task force. After reviewing first the mandate of the office and then the committee report and its appendices, I am very disappointed in the administration and enforcement activities of the Office for Civil Rights.

As a member of this congressional committee, we must make known our interest in the correct administration of this agency.

We have an obligation to see to it that there is equity in education, particularly for women and minorities. I would like to thank all of today's panelists for taking the time to present their testimony before us today. I am looking forward to hearing their comments.

Thank you, Mr. Chairman.

Chairman **Owens.** Mr. Hayes?

Mr. **Hayes.** Mr. Chairman, I do not have a prepared statement. I do want to voice my, as have my two colleagues, my sincere support to your calling this hearing at this time even though I hated to leave the vicinity of my own district to come back here, but I think it is important enough to do it.

I do want to say I hope the results of this hearing will prove me to be wrong. At least I have concluded almost that the backward march that we have in the enforcement of civil rights statutes in terms of opportunity for education at all levels, not just the post secondary levels, but blacks, Hispanics and other minorities, it is by design and no accident.

I hope I am wrong. I can't believe it is personal neglect. When I read some of what has been going on and some of the experiences I have in my own district and some of the directions that have been predetermined as to the way we have gone the past eight or nine years is appalling.

It is destructive to people, those people who are economically disadvantaged, so many of them are in my district, who want to go to school at the post secondary level and, yes, the kindergarteners' programs are being undermined when it comes to funding and resources to keep them active as they should be.

Thank you very much.

Chairman OWENS. I think the people in all of our districts will find these hearings are quite relevant to our districts.

We are pleased to welcome the representatives of the Administration for our first panel.

The Honorable William L. Smith, the Acting Assistant Secretary for the Office for Civil Rights, U.S. Department of Education. The Honorable James P. Turner, the Acting Assistant Attorney General for the Civil Rights Division, U.S. Department of Justice.

Welcome, gentlemen.

You may take your choice.

Mr. Smith?

STATEMENT OF HON. WILLIAM L. SMITH, ACTING ASSISTANT SECRETARY, OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION; HON. JAMES P. TURNER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE; ACCOMPANIED BY: ROGER CLEGG, DEPUTY ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; NATHANIAL DOUGLAS, EQUAL EDUCATION OPPORTUNITY LAWS, DEPARTMENT OF JUSTICE; JAMES LITTLEJOHN, DIRECTOR, REGIONAL AND HEADQUARTERS MANAGEMENT REVIEW TEAM, OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION; KENNETH MINES, REGIONAL DIRECTOR, CHICAGO, DEPARTMENT OF EDUCATION; AND WILLIAM BOSTIC, DEPUTY ASSISTANT UNDERSECRETARY FOR OPERATIONS, OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, AND CATHY H. LEWIS, ACTING DIRECTOR, POLICY AND ENFORCEMENT SERVICE, OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION

Mr. WILLIAM L. SMITH. I am pleased to appear here today on behalf of the Department of Education's Office for Civil Rights.

I also would like to submit to the record the entire testimony, but I don't expect to speak to all of it in my opening.

Chairman OWENS. Without objection, your entire testimony will be entered into the record.

Mr. WILLIAM L. SMITH. I want to thank you for taking the time when you do not have to be here to give us the opportunity to speak to this very important question.

The Chairman's letter invited me to testify regarding OCR's mission to enforce the civil rights statutes under our jurisdiction as well as speak to the question of the staff report.

The Office for Civil Rights was established along with the Department of Education in May 1980, and you have already identified the areas for which we are responsible. OCR has done a good job of enforcing the civil rights statutes and ensuring an equal education opportunity for all Americans. However a number of factors have affected the manner in which OCR enforces these civil rights statutes. I would like to summarize those.

First, the *Adams* v. *Bennett* court order. The court order, which placed stringent time frames on OCR for the processing of complaints and compliance reviews, was in effect until December 1987. It had a significant effect on OCR's flexibility to adjust time frames and limited the agency's ability to prepare and conduct compliance reviews on complex issues and in large institutions because such reviews generally can not be completed within the court required time frames.

In December, 1987, we did make an initial decision to continue to follow the Adams' time frames.

This has resulted, however, in tremendous pressure on our staff to conduct numerous complex complaint investigations and is a primary reason for burnout of OCR staff and the high attrition rates.

I am currently reviewing the entire time frame issue.

The second is the United States Supreme Court decision in Grove City. From February 1984 to March 1988, the United States Supreme Court Grove City decision removed OCR's jurisdiction over a number of complaints previously filed with OCR. Substantial staff resources were used to determine whether or not the agency could establish jurisdiction.

Often, OCR did not have jurisdiction, particularly under the Title VI and Title IX statutes, and in postsecondary institutions, with regard to a number of these complaints.

We did, although, in 1987 make a determination to allow an investigation to go on. We had a Title VI investigation process during that year.

The third were the student health insurance cases, what we call the SHIP cases. Following passage of the Civil Rights Restoration Act in 1988, a single complainant filed 1,261 complaints alleging discrimination in the student health insurance programs offered by many of the Nation's postsecondary institutions. OCR found violations in 712 or 56 percent of these cases and obtained corrective action agreements in all cases where a violation exited.

The fourth was the Civil Rights Restoration Act of March 1988. The Civil Rights Restoration Act (CRRA) reestablished OCR's jurisdiction in a number of case investigations over which we lacked jurisdiction after Grove City. Its effect on OCR's workload has been significant. I draw your attention to the chart at the end of this statement. For example, complaint receipts after the passage of the act have increased 40 percent, and we predict, based on nine months experience in fiscal year 1989, that investigative starts will be up by an estimated 65 percent in fiscal year 1990.

We believe this trend will continue throughout fiscal year 1990. In October 1989, the first month of fiscal year 1990, OCR received 308 complaints, the largest number received in any one month since October 1980.

This represents: a 40 percent increase over October 1988; and an 89 percent increase over October 1987, the last October before passage of the Civil Rights Restoration Act.

These substantial increases in complaints place a tremendous strain on OCR's staff resources. Our recent assessment of regional workload found that a substantial portion of staff resources is devoted to complaint investigations, with correspondingly fewer resources available for conducting compliance reviews or related compliance and technical assistance activities.

As your report notes, OCR has had a very high turnover of staff during the past few years, which I believe may be due in large part to the tremendous pressure to meet time frames and to take on numerous added responsibilities as noted earlier in my testimony. From fiscal year 1986 through fiscal year 1989, OCR lost a total of 482 staff through attrition but hired only 382 replacements. We lost many experienced investigators and attorneys.

The increase in complaints and other workload requirements have made it difficult to address our need for training and staff development. Some of our best experts on program training issues are senior regional investigators whose personal case loads are too heavy to permit them to assist us with training new staff.

As a result, we are not developing, as quickly as we would like, the skills of the people we need to carry out our important mission during the 1990s.

Mr. Chairman, I read in your staff's report that OCR does not do enough Title VI compliance reviews. I have given you some of the reasons why we have not been able to do more. The truth is, however, we want to do more.

In guidance I have provided the Regional Directors, I have stressed the importance of increasing our Title VI compliance review activity for the coming year, even though a continuing high number of complaint receipts may result in an overall lower number of compliance reviews. I am also interested in working in an affirmative way with the Department of Justice to ensure the enforcement of the civil rights laws.

We are currently exploring with DOJ the possibility of conducting two pilot reviews to determine whether the districts are complying with their court-ordered desegregation plans. This joint effort would be beneficial to both agencies.

The purpose of the pilot reviews will be to determine whether resegregation is occurring and the kinds of resources that may be needed to carry out these types of compliance review investigations.

We will find the resources to conduct these pilot reviews. However, the majority of school systems under these court orders are in Region IV, which includes the traditional southern states and is headquartered in Atlanta.

OCR's recent comprehensive assessment of work has shown Region IV to be the most overworked OCR staff in the Nation because of the high number of complaint receipts. As a consequence, Region IV is one of the regions that will be able to do little else this year but complete its complaint investigation activities, unless I am able to find additional assistance for that region.

In fact, I am initiating actions to provide some relief to Region IV and other regional offices with similar problems, primarily Regions V and IX.

I would also note that OCR has initiated two complex Title VI reviews of major university systems involving the issue of alleged discrimination against Asian-American students in admissions. These reviews are extremely resource-intensive and very costly in terms of time, money, and staff.

For example, the three-week on-site visit to the UCLA campus with a team of eight people to gather extensive data on UCLA's admissions procedures to the undergraduate schools of Letters and Sciences and Engineering and to 42 graduate programs cost OCR $25,000 in travel and per diem costs alone. In summary, Mr. Chairman, OCR is doing the best job possible given the resources at its disposal.

Now, let me use my remaining time to discuss the committee's staff report about OCR's operations. The report raised a lot of questions about the operation of the Office for Civil Rights. I am preparing a point-by-point response to the staff report.

My written response also will correct any factual errors contained in the major findings and recommendations in the report. At this time, I will comment on changes made at OCR that address some of the concerns and questions raised by the report.

I know that the Office for Civil rights is doing an effective job of enforcing that statutes and regulations it is charged with enforcing with the resources at its disposal. We have done many things during my tenure, and my predecessor's tenure, at the agency toward this end. Nonetheless, according to this report, there was a perception by some in OCR and elsewhere that, at the time of the report's preparation, OCR was not doing an effective job.

What is the appropriate response to such a perception? I believe the expression of such a perception is a warning light. A warning light to me, as the Acting Assistant Secretary, to determine why such a perception would be held.

Since the summer of 1988, former Assistant Secretary LeGree S. Daniels had been planning to conduct management reviews in all 10 OCR regional offices and of headquarters operations. The committee staff report came to OCR at an opportune time. OCR incorporated the issues identified in the report into the Management Reviews initiated in late 1988.

We have spent a substantial amount of time and effort through the past year in our self-assessment and follow-up activities. This committee should keep in mind that the December 1988 committee's staff report was based on data gathered in the spring and summer of 1988. It is now a year and a half later, and many changes have taken place at OCR. In preparing for today's hearing, I was struck by the number of OCR-initiated recommendations that are being implemented that are similar to recommendations made in the committee's staff report.

If it is necessary for you to query the specifications of what we have regarded to do, I have the Director of our Enforcement Unit, Cathy Lewis; the Director of our Regional and Headquarters Management Review Team, Mr. Jim Littlejohn. I have brought a Regional Director, Mr. Kenneth Mines from Chicago.

I have a Deputy Assistant Undersecretary for Operations, Mr. Bill Bostic.

If you want to ask them with regard to any specifications, they are more than ready to serve you.

These reviews were the most comprehensive ever undertaken by OCR. A highly competent team of senior regional and headquarters managers was charged with critically examining all of OCR's program operations, management practices, and operating procedures.

Included on the team were several managers who are also attorneys. All the team members who carried out the bulk of the regional management reviews had substantial regional experience, and the project was headed by a manager with more than 20 years of OCR experience, including 12 of those years in one of our larger regional offices.

After the reviews were completed, at the end of April 1989, I directed the team to conduct a management review of all headquarter operations with the same degree of thoroughness and competence that had been used in the regional process.

I asked the team to place special emphasis on addressing the concerns and issues raised by regional managers with regard to regional and headquarters relationships and with various aspects of headquarters operations that have a direct effect on regional operations.

The issues and concerns identified in the regional management review process were stated as follows: Regional productivity, as reflected in the rates for meeting due dates and issuing LOFs is very high in all of the regions.

However, the morale of regional managers and staff is affected by many factors listed in my written statement that I will not take the time to mention here.

The team has also identified a range of issues and recommendations that I intend to give high priority to implementing over the next several months.

A major priority that I have identified is the development of a strategic planning capability in OCR to ensure all of our resources are directed to essential activities of the highest priority with regard to short-range operations and long-range strategies.

Following the regional management reviews, I established several work groups comprised of regional and headquarters managers and instructed them to develop proposals and recommendations for addressing significant issues identified by the team. A week long management roundtable with all of our regional directors was built primarily around these follow-up activities.

Let me list some of the accomplishments that have come out of this management review process to date. The management review did, in fact, take into account every single finding and every single recommendation that had been provided us by your committee report.

For the first time the total regional work load was identified. A complete assessment was made of the work activities to be accomplished in fiscal year 1990. Among the numerous activities we are required to conduct, OCR established the following order of priorities for fiscal year 1990. All complaint investigations, compliance activities, including monitoring, magnet school reviews, evaluations of state vocational education methods of administration and Title

VI, IX and Section 504, and age discrimination compliance reviews. We will also focus on staff development and training and case-related technical assistance.

New guidance has been issued for selection of compliance review sites to promote additional complex reviews and reviews on issues not usually addressed in compliance or complaint investigations. OCR's Investigation Procedures Manual is being revised to simplify the monitoring process and provide greater flexibility to regional managers in other aspects of case processing. Our case information tracking system has been modified to collect complete information on OCR's monitoring activities. OCR has developed a policy agenda that identifies the major documents that will be issued this year. This agenda has been coordinated with regional officers to ensure that their immediate policy needs are being met.

In addition, the issues emulating from the management reviews were discussed at this recent roundtable. I will not mention them here even though we see them as important and I have made them available to you in my overall presentation.

Let me say in conclusion that in the nine months I have been directing the Office for Civil Rights I have led some of the most competent staff members that it has been my privilege to work with in many years of Federal service.

These people are responsible for protecting one of the most fundamental precepts of our democracy, the provision of equal education opportunities for all children and adults in America. They take this work very seriously. I have learned that this is an organization capable of conducting careful, honest and highly professional self-scrutiny. I have seen the senior management staff work hard to develop and implement OCR's improvement initiatives.

I have learned in spite of the tremendous amounts of civil rights investigative compliance, enforcement and technical assistance work, this organization attempts to accomplish OCR's achievements are not always fully recognized and credited as they should be.

Where the facts favor the complainant, the recipient may be unhappy. When the facts favor the recipient, the complainant may also be unhappy. This is the nature of our work.

I come here proud of our record. I believe the changes OCR has undergone and will undergo will result in a better managed organization and an agency that will continue to enforce civil rights law expeditiously, efficiently, effectively and evenhandedly.

I recognize that because the majority of complaints OCR receives allege discrimination on the basis of handicap and because complaint investigations consume the greatest number of OCR's resources, it sometimes appears that Section 504 concerns dominate OCR's civil rights efforts.

However, OCR conducts and will continue to conduct, a compliance and enforcement program that addresses each of our statutory authorities effectively, with an appropriate balance of activities.

Lastly, my staff and I will carefully review all of the proceedings of these hearings to identify any additional areas of concern that we have not yet addressed.

Thank you, Mr. Chairman, and members of the committee, for the opportunity to address the committee. I am ready to respond to any questions that you or the members might have.

[The prepared statement of William L. Smith follows:]

TESTIMONY

of

WILLIAM L. SMITH

Acting Assistant Secretary for Civil Rights

Department of Education

Before the House Committee on Education and Labor

November 28, 1989

OPENING STATEMENT
BEFORE
THE COMMITTEE ON EDUCATION AND LABOR

Mr. Chairman, Members of the Committee, I am pleased to appear here today on behalf of the Department of Education's Office for Civil Rights (OCR).

I am Bill Smith, Acting Assistant Secretary of the Office for Civil Rights. I have served in this capacity for approximately 9 months since March 1989. Previously, I served as: 1) the Associate Commissioner for Educational Personnel Development and, later, for Career Education in the Office for Vocational and Adult Education; 2) National Director of the Teacher Corps; 3) United States Commissioner of Education; 4) Acting Deputy Under Secretary for Intergovernmental and Interagency Affairs; 5) Administrator of Education for Overseas Dependents; and 6) Administrator of the Administrative Review Task Force in the Office of the Deputy Under Secretary for Intergovernmental and Interagency Affairs.

The Chairman's letter invited me to testify regarding OCR's mission to enforce the civil rights statutes under our jurisdiction. The Office for Civil Rights was established along with the Department of Education in May 1980. The Office is charged with enforcing the following civil rights statutes with respect to institutions that receive Federal financial assistance:

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color and national origin;

- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;

- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination of the basis of handicap; and

- The Age Discrimination Act of 1975.

To begin, I believe that OCR has done a good job of enforcing these civil rights statutes and ensuring an equal educational opportunity for all Americans. However, since May 1980, a number of factors have affected the manner in which OCR enforces these civil rights statutes. I would summarize these as follows:

- The Adams v. Bennett court order

  This court order, which placed stringent time frames on OCR for the processing of complaints and compliance reviews, was in effect until December 1987. It had a significant effect on OCR's flexibility to adjust time frames and limited the agency's ability to prepare and conduct compliance reviews on complex issues and in large institutions, because such reviews generally cannot be completed within the court-required time frames. In December 1987, an initial decision was made to follow the Adams time frames. This has resulted, however, in tremendous pressures on our staff to conduct numerous complex complaint investigations and is a primary reason for "burnout" of OCR staff and high attrition rates. I am currently reviewing the entire time frame issue.

- The United States Supreme Court Decision in Grove City

From February 1984 to March 1988, the United States Supreme Court's Grove City decision removed OCR's jurisdiction over a number of complaints previously filed with OCR. Substantial staff resources were used to determine whether or not the agency could establish jurisdiction. Often, OCR did not have jurisdiction, particularly under the Title VI and Title IX statutes, and in postsecondary institutions, with regard to a number of these complaints.

- Student Health Insurance Program (SHIP) Cases

Following passage of the Civil Rights Restoration Act in 1988, a single complainant filed 1,261 complaints alleging discriminatory student health insurance programs in many of the nation's postsecondary institutions. OCR found violations in 712 or 56% of these cases and obtained corrective action agreements in all cases where a violation existed.

o The Civil Rights Restoration Act of March 1988

The Civil Rights Restoration Act (CRRA) re-established OCR's jurisdiction in a number of case investigations over which we lacked jurisdiction after Grove City. Its effect on OCR's workload has been significant. I draw your attention to the graph at the end of this statement. For example, complaint receipts after the passage of the Act have increased by 40%, and we predict, based on 9 months experience in FY 1989, that investigative starts will be up by an estimated 65% in FY 1990. We believe this trend will continue throughout FY 1990. In October 1989, the first month of FY 1990, OCR received 308 complaints, the largest number received in any one month since October 1980. This represents:

- a 40% increase over October 1988; and
- an 89% increase over October 1987, the last October before passage of the Civil Rights Restoration Act.

These substantial increases in complaints place a tremendous strain on OCR's staff resources. Our recent assessment of regional workload found that a substantial portion of staff resources is devoted to complaint investigations, with correspondingly fewer resources available for conducting compliance reviews or related compliance and technical assistance activities.

As your report notes, OCR has had a very high turnover of staff during the past few years, which I believe may be due in large part to the tremendous pressure to meet time frames and to take on numerous added responsibilities, as noted earlier in my testimony. From FY 1986 through FY 1989, OCR lost a total of 482 staff through attrition but hired only 382 replacements. We lost many experienced investigators and attorneys. The increase in complaints and other workload requirements have made it difficult to address our need for training and staff development. Some of our best experts on program training issues are senior regional investigators whose personal case loads are too heavy to permit them to assist us with training new staff. As a result, we are not developing, as quickly as we would like, the skills of the people we need to carry out our important mission during the 1990's.

Mr. Chairman, I read in your staff's report that OCR does not do enough Title VI compliance reviews. I have given you some of the reasons why we have not been able to do more. The truth is, however, we want to do more. In guidance I have provided to the Regional Directors, I have stressed the importance of increasing our Title VI compliance review activity for the coming year, even though a continuing high number of complaint receipts may result in an overall lower number of compliance reviews. I am also interested in working in an affirmative way with the Department of Justice (DOJ) to ensure the enforcement of the civil rights laws. We are currently exploring with DOJ the possibility of conducting two pilot reviews to determine whether the districts are complying with their court-ordered desegregation plans. This joint effort would be beneficial to both agencies. The purpose of the pilot reviews will be to determine whether resegregation is occurring and the kinds of resources that may be needed to carry out these types of compliance review investigations.

We will find the resources to conduct these pilot reviews. However, the majority of school systems under these court orders are in Region IV, which includes the traditional southern states and is headquartered in Atlanta. OCR's recent comprehensive assessment of work has shown Region IV to be the most overworked OCR staff in the nation because of the high number of complaint receipts. As a consequence, Region IV is one of the regions that will be unable to do little else this year but complete its complaint investigation activities, unless I am able to find additional assistance for that region. In fact, I am initiating actions to provide some relief to Region IV and other regional offices with similar problems.

I would also note that OCR has initiated two complex Title VI reviews of major university systems involving the issue of alleged discrimination against Asian-American students in admission to postsecondary institutions. These reviews are extremely resource-intensive and very costly in terms of time, money, and staff. For example, the 3-week on-site visit to the UCLA campus with a team of 8 people to gather extensive data on UCLA's admissions procedures to the undergraduate schools of Letters and Sciences and Engineering and to 42 graduate program cost OCR $25,000 in travel and per diem costs alone. In summary, Mr. Chairman, OCR is doing the best job possible given the resources at its disposal.

Now, let me use my remaining time to discuss the Committee's staff report about OCR's operations. The report raised a lot of questions about the operation of the Office for Civil Rights. I am preparing a point-by-point response to the staff report. My written response also will correct any factual errors contained in the major findings and recommendations in the report. At this time, I will comment on changes made at OCR that address concerns and questions of the Report.

I know that the Office for Civil Rights is doing an effective job of enforcing the statutes and regulations it is charged with enforcing with the resources at its disposal. We have done many things during my tenure, and my predecessor's tenure, at the agency toward this end. Nonetheless, according to this report, there was a perception by some in OCR and elsewhere that, at the time of the report's preparation, OCR was not doing an effective job.

What is the appropriate response to such a perception? I believe the expression of such a perception is a warning light. A warning light to me, as the Acting Assistant Secretary, to determine why such a perception would be held.

Since the summer of 1988, former Assistant Secretary LeGree S. Daniels had been planning to conduct management reviews in all 10 OCR regional offices and of headquarters operations. The Committee staff report came to OCR at an opportune time. OCR incorporated the issues identified in the report into the Management Reviews initiated in late 1988. We have spent a substantial amount of time and effort through the past year in our self-assessment and follow-up activities. This Committee should keep in mind that the December 1988 Committee's staff report was based on data gathered in the spring and summer of 1988. It is now a year and a half later, and many changes have taken place at OCR. In preparing for today's hearing, I was struck by the number of OCR-initiated recommendations being implemented that are similar to recommendations made in the Committee's staff report.

These reviews were the most comprehensive ever undertaken by OCR. A highly competent Team of senior regional and headquarters managers was charged with critically examining all of OCR's program operations, management practices, and operating procedures. Included on the Team were several managers who are also attorneys. All the Team members who carried out the bulk of the regional management reviews had substantial regional experience, and the project was headed by a manager with more than 20 years of OCR experience, including 12 of those years in one of our larger regional offices.

The objectives of the regional management review process were as follows:

1. to determine whether the Assistant Secretary's systems for ensuring the integrity of case processing were in place and being implemented;

2. to identify, and reach an understanding of, any problems regional offices were having in implementing OCR policies or integrity systems, and to recommend proposed solutions to those problems;

3. to identify significant obstacles to the efficient and effective management of the regional offices, and to develop recommendations for enhancing regional office/headquarters relations; and

4. to identify exemplary management techniques that may be of benefit to other regional offices, or to the organization as a whole.

The process followed by the Review Team was exhaustive. At the initial planning stages in November 1988, the Team examined in depth all of the Findings and Recommendations of the Staff Report, and incorporated questions into the interview forms to address these. Before the on-site review visit to each regional office, attorneys in the headquarters Policy Division closely scrutinized all Letters of Findings (LOFs) issued by each regional office for 4 to 6 months and recorded any questions or concerns with the presentation of evidence, the application of policy or the conclusions of law. These LOFs were further scrutinized by the Team, which had extensive programmatic expertise. Where questions remained, regional files were examined and discussions were held with regional managers about the cases.

Files of administrative closures were also examined as well as files and practices related to the implementation of various integrity systems that have been put into place in the past 3 years. From the various files and document reviews, the Team found that:

o the Assistant Secretary's systems to ensure integrity in case processing are in place and being implemented by all regional offices. Overall, the quality of case investigations is very good, as reflected in case files and LOFs. Conscientious and successful efforts are being made to meet OCR's Investigation Procedures Manual (IPM) requirements in all 10 regional offices.

- Some of the "integrity" systems should be re-examined and substantially revised. Portions of the Quality Control/Case Assessment program, which is designed to ensure that regional case files meet OCR's case-processing standards, are redundant; the program needs a major overhaul. The Uniform Management Systems Procedure, which ensures the integrity of OCR's case-processing procedures, is meeting the purpose for which it was established, but it should be further refined to eliminate some duplication and excessive recordkeeping requirements.

The file review process described above was only a portion of the review. In-depth interviews were held with each regional management team, the Regional Director, the Deputy Regional Director, the Chief Civil Rights Attorney, all Division Directors, all Branch Chiefs within their respective investigative Divisions, and the Director of the Program Review and Management Staff. Three to four sets of interviews were held in each regional office, with each interview lasting from 6 to 10 hours. The Review Team covered all aspects of regional program and management operations, including the issues raised in the staff Report. The Team also placed special emphasis on issues related to headquarters/regional relations.

One of the reasons the interviews were so lengthy was the extremely positive response to the Management Review process by all levels of regional management and their willingness to share their concerns, ideas, and recommendations with the Team.

At the end of each on-site visit, the Team provided the Regional Director with substantive feedback on the status of the Regional Office from a program and management perspective and made recommendations for enhancing the region's operations. In addition, each region was provided with a written report of the Team's findings and recommendations.

After the Regional reviews were completed, at the end of April 1989, I directed the Team to conduct a management review of all headquarters operations with the same degree of thoroughness and competence that had been used in the regional process. I asked the Team to place special emphasis on addressing the concerns and issues raised by regional managers with regard to regional/headquarters relationships and with various aspects of the headquarters operations that have a direct effect on regional operations.

The issues and concerns identified in the regional management review process were stated as follows:

> Regional productivity, as reflected in the rates for meeting due dates and closing complaints, is very high in all of the regions. However, the morale of regional managers and staff is affected by such factors as:
>
> - an increasing workload;
> - pressure to meet 100% of case processing time frames;
> - rigidity of current case processing time frames;

- extensive levels of review of work products;
- lack of flexibility in many case processing procedures;
- insufficient time to do complex compliance reviews or to participate in training programs;
- numerous reporting and administrative requirements;
- the age and condition of equipment; and
- the use of extensive overtime and compensatory time to meet case-processing time frames.

In general, regional managers feel that they have little control over their workload, limited planning opportunities, and little discretionary time for staff development activities. The above concerns must be addressed and resolved to enhance the operations of the regional offices and to increase job satisfaction for regional managers and staff.

Our self-initiated management review has presented us with the following larger issues on which our attention has been focused and where we believe we have developed better practices and procedures:

1. To clarify OCR's programmatic goals and objectives that it expects to accomplish and the role each of the program activities should have in meeting those goals and objectives;

2. To ensure that the current regional office organizational structure is the most efficient and effective way of carrying out OCR's goals and objectives;

3. To maintain the relationship of long-range development of human resources to increased productivity, e.g., increased innovation, improvement in work quality, and improved morale;

4. To ensure that OCR's procedures for case processing are sufficiently flexible to allow regional managers to apply their expertise and discretion to improve the efficiency of regional operations, while ensuring a high-quality work product;

5. To clarify the relationship between headquarters and the regional offices in terms of the areas where headquarters is to provide a support function to regional offices, and the areas where headquarters carries out a directing or oversight function, and the role each headquarters unit has with regard to each of these functions; and

6. To clarify the short- and long-term technological needs of the regional offices in terms of hardware, software, training of staff to use sophisticated equipment, and effective maintenance of such equipment, and whether the current OCR office automation plan is consistent with regional office technological needs.

The Headquarters Management Review Team considered the above concerns and issues as part of its review process, in addition to looking at all aspects of headquarters operations. The Team found, as in the Regional reviews, that there are a large number of dedicated, hardworking staff in headquarters who are carrying out functions and activities essential to the effective operation of OCR.

The Team has also identified a range of issues and recommendations that I intend to give high priority to implementing over the next several months. A major priority that I have identified is the development of a strategic planning capability in OCR to ensure that our resources are always directed to essential activities of the highest priority with regard to both short-range operations and long-range strategies.

Following the regional Management Reviews, I established several work groups comprised of regional and headquarters managers and instructed them to develop proposals and recommendations for addressing the significant issues identified by the Team. A week-long management Roundtable held earlier this month was built primarily around follow-up activities to these reviews. Let me list some of the many accomplishments that have come out of this Management Review process to date:

- For the first time in OCR's history, the total regional workload was identified and a complete assessment was made of the work activities to be accomplished in FY 1990. Among the numerous activities we are required to conduct, OCR has established the following order of priorities for FY 1990:

    - complaint investigations;

    - compliance activities, e.g., monitoring; Magnet School reviews, evaluations of state vocational education Methods of Administration, compliance reviews;

    - staff development and training; and

    - case-related technical assistance.

- New guidance has been issued for selection of compliance review sites to promote additional complex reviews and reviews on issues not usually addressed in complaint investigations.

- OCR's Investigation Procedures Manual (IPM) is being revised to simplify the monitoring process and provide greater flexibility to regional managers in other aspects of case processing, and our case information tracking system has been modified to collect complete information on OCR's monitoring activities.

- o For the first time, OCR has developed an agenda that identifies the major documents that will be issued this year. This agenda has been carefully coordinated with the regional offices to ensure that their immediate policy needs are being met.

In addition, the issues emanating from the Management Reviews were discussed in depth at the recent Roundtable:

- o Efficiency in handling complaint investigations and monitoring;
- o Examination of alternative regional organizational structures;
- o Opportunities for cooperation and collaboration between the Department of Justice and OCR;
- o Implementing an effective compliance review program;
- o Cost-effective technical assistance programs;
- o OCR's technology needs;

- Issues related to complex compliance reviews; and
- Headquarters/regional relationships.

Let me say in conclusion that in the 9 months I've been directing the Office for Civil Rights I've learned many things. I've met some of the most competent, motivated staff members that it has been my privilege to work with in many years of Federal service. These people are responsible for protecting one of the most fundamental precepts of our democracy: the provision of equal educational opportunities for all children and adults in America. They take this work very seriously!

I've learned that this is an organization capable of conducting careful, honest, and highly professional self scrutiny, and I've seen the senior management staff work hard to develop and implement OCR improvement initiatives. And I've learned that, in spite of the tremendous amount of civil rights investigative, compliance, enforcement, and technical assistance work this organization accomplishes, OCR's achievements are not always fully recognized and credited as they should be. When the facts favor the complainant, the recipient may be unhappy. When the facts favor the recipient, the complainant may also be unhappy. This, we understand, is the nature of our work.

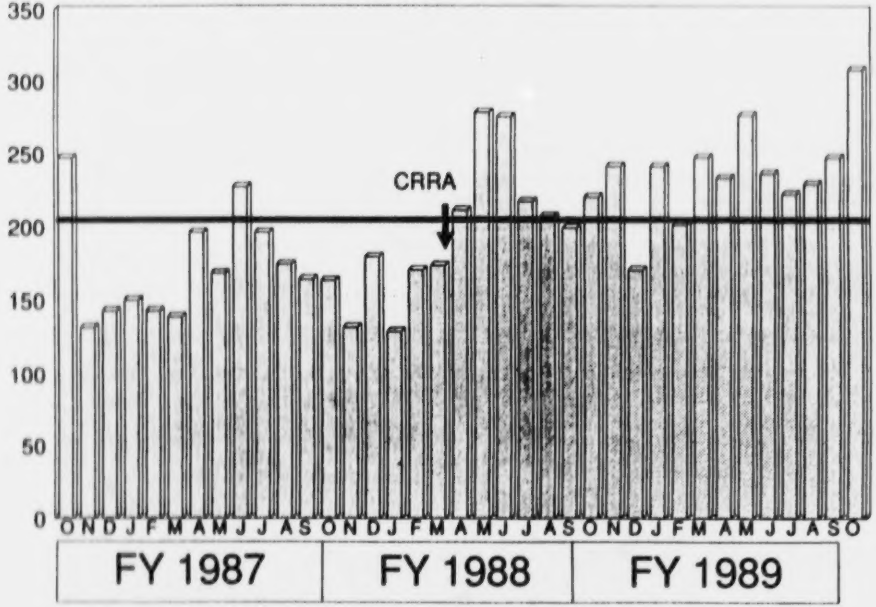
I come here proud of this record. I believe that the changes OCR has undergone and will continue to undergo as a result of this most comprehensive effort will result in a better managed organization and an agency that will continue to enforce the civil rights laws expeditiously, efficiently, effectively, and evenhandedly. I recognize that, because the majority of complaints OCR receives allege discrimination on the basis of handicap and because complaint investigations consume the greatest number of OCR resources, it sometimes appears that Section 504 concerns dominate OCR's civil rights efforts. However, OCR has conducted and will continue to conduct a compliance and enforcement program that addresses each of our statutory authorities effectively, with an appropriate balance of activities.

Lastly, my staff and I will carefully review all of the proceedings of these hearings to identify any additional areas of concern that we have not yet addressed.

Thank you for the opportunity to address the Committee. I am ready to respond to any questions that the Members might have.

REGULAR COMPLAINT RECEIPTS *

October 1986 through October 1989



* DOES NOT INCLUDE SINGLE COMPLAINANT OR RE-FILED CASES

Chairman OWENS. Mr. Turner?

Your written testimony will be entered into the record.

Mr. TURNER. Thank you, Mr. Chairman.

I will only summarize that testimony at this point.

I am pleased to respond to your letter inviting the Attorney General's representative to discuss with you the enforcement of laws relating to equal educational opportunities.

Let me introduce the gentlemen with me.

To my immediate right is Deputy Assistant Attorney General Roger Clegg, and to his right is the chief of the section responsible for enforcing equal educational opportunity laws, Nathaniel Douglas.

Mr. Chairman, it is a pleasure to appear before you today.

For almost a year, since December of 1988, I have had the privilege of acting as the Assistant Attorney General for the Civil Rights Division.

In that capacity I have been responsible for directing the Civil Rights Division's enforcement activities.

But as an attorney in the Civil Rights Division since 1965, in the early days of the enforcement of Title IV and the school desegregation laws, I bring an absolutely broader perspective.

I have been extremely proud, Mr. Chairman, of the Civil Rights Division's contributions over the years to what the statute calls "the orderly desegregation of public schools." Our lawyers participated in literally hundreds of school desegregation cases and contributed to the development of legal principles that have caused a major social change in our country.

That work is not nearly done, Mr. Chairman, but I think it is inspiring on occasion to look back over the ground that we have traversed.

The Administrations of both parties have relentlessly worked to eliminate segregated schools from our educational life, but we still have far to go.

Let me describe to you what projects we are now working on in the Civil Rights Division in this tradition.

In the area of elementary and secondary education, we still must monitor the good faith compliance with the hundreds of court orders requiring the desegregation of public schools. Also, in my judgment, we need to establish the rules of the end game; how do we get courts out of the business of running schools once compliance has been obtained and return the control to the local authorities?

In the written testimony I have submitted, it sets forth in detail what the Civil Rights Division is currently doing in this field. We are litigating essentially with those districts that are not complying with their court orders. We are encouraging courts, where it is appropriate, to spell out the rules for disengaging judicial supervision of school districts and the daily management of school affairs once compliance has been obtained.

In the area of higher education, we have litigated statewide challenges to the vestiges of segregated college systems in Alabama, Mississippi, and in Louisiana. Each of these cases has been a massive undertaking, and each is in a slightly different procedural posture at the present time.

The details of these are also set forth in my testimony. But, we are committed once and for all to pursue a just and final remedy in these higher education cases—a remedy, incidentally, that will not involve abolishing predominantly black schools that have served black students so long and so well.

We have also recently been concerned, and very seriously concerned, about reported quotas used for Asian and Asian-American students in some of the universities in the country. The Office for Civil Rights of the Education Department has taken the lead in investigating those matters.

If we receive a referral from that office or if the Attorney General receives Title IV complaints, we stand ready to investigate and, if necessary, litigate the matter.

The third major area of our current concern is in the area of handicapped students. There are two key acts of Congress involved here.

The Education for All Handicapped Children Act and the Rehabilitation Act of 1973. We recently helped win a major legal victory in the EHA area in a case called *Timothy W.* v. *Rochester*.

There, the First Circuit held, as we had urged, that the EHA, when it says all students—all children—that it means that very thing, that all children are entitled to an appropriate public education, not just those who in the judgment of local administrators may meet some standard of educable capacity.

I am pleased to report that yesterday the Supreme Court declined to review that judgment, and it will now stand as the law of the land, at least in the Northeast part of the country in the First Circuit.

We also have an ongoing and effective program under Section 504. We filed suit against the University of Alabama in Birmingham to compel them to require interpreters for hearing impaired students.

We are appealing to the court of appeals the negative judgment of the district court on the sufficiency of lift-equipped buses. They were provided for only four hours a day, which in our judgment is insufficient under Section 504.

Mr. Chairman, I have been in the civil rights enforcement business in the Department of Justice for almost 25 years. I can report to you that the Civil Rights Division today is maintaining an active and effective enforcement program with respect to the laws concerning equal educational opportunity.

I would be pleased to discuss that effort with you and your colleagues and to the best of my ability answer any questions you may have.

[The prepared statement of James P. Turner follows:]

Department of Justice

STATEMENT

OF

JAMES P. TURNER
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE

COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

LAWS RELATING TO EQUAL EDUCATIONAL OPPORTUNITY

NOVEMBER 28, 1989

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before you today to discuss the enforcement of laws relating to equal educational opportunity. The enforcement efforts of the Civil Rights Division fall into three categories: (1) combating discrimination in higher education; (2) eliminating segregation in primary and secondary schools; and (3) enforcing the laws that promote educational opportunity for handicapped individuals. Traditionally, of course, the bulk of the Division's work has concerned the dismantling of dual, primary and secondary school systems and that remains true, even though the nature of our activities has evolved as substantial progress has been made. In recent years, we have also made significant advances in dismantling dual systems of higher education and in ensuring that state and local authorities provide educational opportunity for handicapped students, as required by the Rehabilitation Act and the Education of the Handicapped Act. The Division's accomplishments continue to be substantial. I will now turn to a more detailed discussion of our recent activities.

Higher Education

In recent years, we have been in the vanguard in our efforts to eliminate dual systems of higher education. We have litigated statewide challenges to segregation in higher education in Alabama, Mississippi, and Louisiana. In Alabama, after a lengthy trial, we established liability in the district court, only to have the court of appeals vacate the decision because of the district court judge's refusal to recuse himself from the case. After additional litigation in the district court and court of appeals addressing recusal, we are now preparing the case for a second trial on the merits.

In Louisiana, after lengthy discovery and a trial, we were successful in establishing liability in the district court, which recently ordered a comprehensive restructuring of the state university system. While we are generally pleased with the plan, we have objected to that portion which orders dissolution of the Southern University Law School and its merger into LSU Law School. Direct appeals have been taken to the Supreme Court. There is a question whether the Supreme Court has jurisdiction or whether the case should be sent to the court of appeals. In any event, we expect generally to support the district court's decision.

In Mississippi, we sued in 1975 to eliminate the vestiges of that state's racially segregated and unequal system of higher education. In December 1987, the district court ruled that the defendants had disestablished the dual system by adopting a race-neutral admissions policy, even though in other respects we argued that vestiges of the dual system remained. We appealed to the Fifth Circuit, our appeal was argued last spring, and a decision is pending.

We are also actively monitoring the investigation into allegations that certain universities have limited the number of Asian students that they admit. These allegations involve a number of schools and we are very troubled by them. Such a practice is obviously intolerable. The Office of Civil Rights Of the Department of Education (OCR) has initial responsibility for investigating these complaints. We understand that OCR is investigating admissions policies at the University of California at Los Angeles and Harvard University, and making preliminary inquiries into admissions policies at the University of California at Berkeley. If OCR's investigations uncover evidence of discrimination, it may refer the matters to us and we will respond promptly.

Primary and Secondary Education

Thirty-five years after *Brown* v. *Board of Education*, the effort to provide equal educational opportunity for primary and secondary school students continues, but its contours have changed. During the 1960's and 1970's, the Division led the way in obtaining orders that some 400 school districts adopt desegregation plans. Most of those districts continue to operate under those plans and under court supervision. Thus, the emphasis has shifted from filing large numbers of new lawsuits to enforcing existing orders, seeking further relief where prior efforts have failed, and bringing cases to a conclusion where segregation and its vestiges have been eradicated. This shift has meant that our activities address new issues and often do so through a combination of negotiated and court-ordered relief.

This is not to say that the Division has stopped filing and litigating desegregation suits. For example, our successful suit against Yonkers, New York, has received considerable publicity. Since 1985, we have filed five additional desegregation suits and have won relief in each. In another suit, against Charleston, South Carolina, trial was just completed, and we are awaiting a decision from the court.

The bulk of our primary and secondary enforcement effort, however, has focused on those 400 districts already under court order. Information about these districts reaches us in three principal ways. First, we receive statistical reports from most of the districts annually. Second, we receive complaints from citizens or employees about districts under court order. Finally, when districts seek to modify or terminate the court orders under which they operate, they must justify the changes, and we undertake our own investigations.

Where these sources of information have uncovered the need for further action, we have taken it, either by seeking enforcement of existing orders or by seeking further relief. The Division's enforcement efforts with respect to primary and secondary education have resulted in numerous consent decrees and court orders in the last three years. For example, in 1988, we filed a motion for further relief against the Natchez, Mississippi school district after our investigation revealed discriminatory employment and student assignment practices. We prevailed, and the district is now implementing a new remedial plan. We recently filed a motion to enforce a previous order obtained against the Meriwether, Georgia school district after we determined that the district was assigning students in a racially discriminatory manner. We recently obtained a temporary restraining order in this case, which should go to trial within the next 90 days.

Also in 1988, the Corpus Christi, Texas school district moved to modify its court-ordered desegregation plan, with the concurrence of private plaintiffs. The government, however, believed that some of the proposed modifications violated the existing court order and objected to them. After trial, the district court agreed with the government and the matter was resolved through negotiation.

That same year, two school districts in Mississippi -- Vicksburg and Warren County -- advised us that they had agreed to consolidate. Because their proposal would have produced several all-black schools, we objected to the proposal and initiated legal proceedings against the districts. Eventually, the Department and the districts worked together to produce a plan that desegregated several racially identifiable schools, and created several magnet schools that will enhance the quality of education that students of all races receive.

We also participated in the recent effort to desegregate further the Savannah-Chatham County, Georgia schools. Largely because of white flight following an earlier desegregation order, many of the system's schools had become racially identifiable again. The district proposed a new plan, which we endorsed generally, with one substantial reservation. Under the Board's proposal, new desegregated magnet programs were housed in all black schools with little or no interaction between the magnet and non-magnet students. Under this plan, a significant percentage of black students would continue to attend all-black classes. We argued that, under desegregation principles, such students should share at least some classes and activities with the magnet students. The district court rejected our argument, but the court of appeals, while generally affirming the district court's approach, directed that our position be incorporated into the court order. Stell v. Savannah-Chatham County Board of Education, No. 88-8465 (11th Cir. 1989).

The Civil Rights Division, of course, has worked hard to implement the relief that it won in Yonkers, New York, in 1985. Since then, there have been numerous orders and appeals. The education part of the remedy has been implemented, for the most part, and the city's schools have been largely desegregated. The housing side of the case should soon produce construction of low-income housing that will result in further desegregation by changing the racial composition of neighborhoods.

Over the past several years, many districts have moved for an end to court supervision, contending that the successful operation of their remedial plans has eliminated all vestiges of their prior segregation. It is our view of the law that, where a district can show that it has operated a unitary system for the requisite period, there is no justification for further court supervision. This is sound law and sound policy and just common sense.

The precise procedures and standards for lifting court supervision are presently being worked out in the courts. The Division has participated in this process, largely because it is at least partially responsible for many of these court orders and feels a duty to contribute to the development of a sound jurisprudence for closing successful school cases and returning the operation of school systems to local officials. Title IV, after all, requires us to further "the orderly achievement of desegregation in public education", a process that obviously includes an orderly end to litigation. Our views have prevailed in the Fourth Circuit in *Riddick* v. *School Board*, 784 F.2d 521 (4th Cir. 1986) and Fifth Circuit in *U.S.* v. *Overton*, 834 F.2d 1171 (5th Cir.).

In the Eleventh Circuit, the Division recently prevailed in one appeal and is a participant in two others that should contribute to this jurisprudence. The case of *United States and Charlie Ridley* v. *Georgia*, No. 89-8179 (11th Cir.), involved nine school districts that have operated since 1974 pursuant to a consent order. Since that time, the case has been inactive. In 1988, the United States moved for a declaration of unitariness, dissolution of all injunctions, and dismissal of the cases. Private plaintiffs and, ultimately, defendants objected and sought through motion to have the cases dismissed while retaining the injunctions and without declaring the systems unitary. The United States countered that the cases could not be dismissed unless the systems were declared unitary, in which event all injunctions would have to be dissolved. The district court agreed with the government that the cases should not be dismissed in the present posture, and the court of appeals recently dismissed private plaintiffs' appeal for lack of jurisdiction. I have recently agreed to meet with a representative of private plaintiffs to discuss the future of these and similar cases.

Lee v. Macon County Board of Education, No. 88-7471 (11th Cir.) (argued Aug. 9, 1989), derived from a statewide action to desegregate schools in Alabama. In 1985, the district court approved a joint stipulation of dismissal and entered a judgment stating that the school system had achieved unitary status and dismissing the case. In 1988, private plaintiffs sought to reopen the case, alleging discrimination in school closings and new construction. The United States countered that the case had been dismissed and could not be reopened, although we also stressed that plaintiffs were free to file a new lawsuit. The district court refused to reopen the case and private plaintiffs appealed. This appeal should help establish the import of a declaration of unitariness and dismissal of a case.

Lee v. Macon County Board of Education, Nos. 88-7551, 88-7552, and 88-7553 (11th Cir.) (argued Aug. 9, 1989), derives from the same statewide action, but involves three different school districts. In 1987, after an extended period of court supervision, the district court entered an order to show cause why these cases, which had been inactive, should not be dismissed. After discovery, a non-evidentiary hearing, and briefing, the court declared the systems unitary, dismissed the cases, and dissolved all injunctions. Private plaintiffs appealed, challenging the district court's procedures and its ruling that dismissal necessarily dissolves all outstanding injunctions. The United States supported the district court. I shall add, Mr. Chairman, that in the original action before the district court, we also persuaded the court that dismissal of four of the seven cases at issue was not yet appropriate, requiring at a minimum additional data from defendants.

Thus, the Division has sought to bring some cases to a conclusion when the case has been inactive and the evidence supports a finding that the system involved has achieved unitary status. Equally importantly, however, where the process of adjudicating the question of unitariness has uncovered new discrimination or has revealed that the vestiges of discrimination have not been eliminated, the Division has pressed for compliance with existing orders and further relief. For example, the district court recently declared unitary the San Felipe-Del Rio, Texas school district over the objection of the United States and private plaintiffs. The United States has appealed the district court's dismissal of the case, arguing that the school district's failure to comply with reporting requirements regarding its bilingual program makes it impossible to determine whether it has eliminated the vestiges of its prior discrimination against Mexican American students. United States v. Texas, No. 89-1304 (5th Cir.).

Similarly, in 1987, the Lowndes County, Alabama school district sought a declaration of unitary status. The Division's investigation revealed that Lowndes and eight other school districts were participating in an extensive "web" of illegal interdistrict transfers that enabled white students to transfer to predominantly white schools. We successfully negotiated consent decrees with five of these districts, but proceeded to trial against three. After the district court ruled against us, we prevailed on appeal. United States v. Lowndes County Board of Education, No. 88-7560 (11th Cir. July 13, 1989).

The problem of impermissible interdistrict transfers encountered in Lowndes County highlights another important aspect of the Division's work: cooperation with state officials to help eliminate statewide problems of noncompliance. For example, during the past several years, in Alabama and elsewhere, the Division has received numerous complaints of illegal transfers, most involving white students' efforts to avoid attending predominantly black schools by using false addresses and specious guardianships. Although we have pursued several of these complaints in individual court proceedings, this course consumes a disproportionate share of the Division's resources. We have, therefore, met with the state Attorney General and education officials to persuade them to cooperate in eliminating these illegal transfers. We are optimistic about reaching an agreement pursuant to which the State will play an active role in monitoring transfers. Similarly, we have worked closely in recent years with the Texas Education Agency to share information and coordinate compliance efforts. We have accomplished a good deal with this two-pronged effort of negotiation and litigation and plan to deal with future compliance issues in this way.

Education of Handicapped Individuals

In recent years, there has been a growing understanding in the country of the importance of extending to handicapped individuals the opportunity to participate fully in our society. This understanding led, in the last Congress, to amendments to extend the guarantees of the Fair Housing Act to handicapped individuals and in this Congress has fueled the drive to enact the Americans with Disabilities Act. Both of these efforts enjoy the strong endorsement of this Administration.

In the field of educational opportunity, we have undertaken important litigation to further enforcement of the two key laws that guarantee educational opportunity for handicapped individuals: the Education of All Handicapped Children Act (EHA) and the Rehabilitation Act of 1974. Regarding the EHA, the Civil Rights Division participated in the United States court of appeals for the First Circuit as amicus curiae in Timothy W. v. Rochester School District, 875 F.2d 954 (1st Cir. 1989). In this case, the district court held that the child was so severely handicapped that the school district was not required to attempt to provide him with the "free and appropriate" education mandated by the EHA for all handicapped children. We argued successfully before the court of appeals that the statute mandated educational services for all handicapped children, regardless of the severity of a child's handicap. The school district's petition for certiorari is pending before the Supreme Court.

On March 23, 1989, we received a favorable decision from the Eleventh Circuit in Rogers v. Bennett, 873 F. 2d 1389, affirming the district court's dismissal of a suit brought by the State of Georgia and two of its counties to block administrative enforcement proceedings by the Department of Education. The State and counties had refused to allow the Department of Education to investigate alleged deficiencies in the education of handicapped students, arguing that the Department has no jurisdiction to investigate such complaints under Section 504 of the Rehabilitation Act because the EHA provides the exclusive avenue for parents to complain of deficient educational opportunities for handicapped students. The court of appeals agreed with our contention that the Department of Education's authority to investigate compliance with Section 504 does not depend on parental exhaustion of EHA remedies. This decision cleared the way for the Department of Education's enforcement action to proceed.

We also sued the University of Alabama-Birmingham to enforce directly the protections of Section 504. We argued successfully that its practice of requiring hearing-impaired students to pay for classroom interpreters ran afoul of Section 504's prohibition of discrimination on the basis of handicap in federally assisted programs. We contended that while a college is not required to provide personal services to handicapped students, it is responsible for providing classroom interpreters who would benefit all hearing impaired students in the classroom and permit them to receive the benefits of the university's federally assisted educational programs. We have appealed the district court's decision that the university's on-campus bus system, which provides a wheelchair lift-equipped bus for only four hours of its twelve-hour day, adequately served mobility-impaired students. The appeal has been briefed and is pending in the Eleventh Circuit. United States v. Bd. of Trustees of the University of Alabama, No. 89-7148.

Conclusion

As the foregoing discussion of selected cases demonstrates, the Civil Rights Division remains in the forefront of the effort to ensure equal educational opportunity for all students at all levels of education. Under the present Administration we look forward to a continuation of this positive enforcement role. I will gladly answer the Members' questions.

Chairman **Owens**. Thank you very much for your testimony.

Even though we don't have a clock today, I am going to try to respect the spirit of the five-minute rule. If necessary, we will have a second round of questioning.

I would like to begin with a simple question for Mr. Smith.

You know, it is hard not to be moved by your description of the overwhelming work load of the agency and how people are burned out and working hard, but I just wonder is your sense of purpose and sense of urgency—and you mentioned internal action, modifications of procedures and new manuals being prepared and a number of other things that you are working hard at—is that shared by the Administration, by the President and by the Secretary, that same sense of urgency? And if so, why don't you have a permanent Assistant Secretary at this point.

What has been the situation with respect to your budget? If you are overworked, can you get more people? Have you asked for more people?

Have you spent all the money that was allocated to you in the past year? What is the situation with respect to the way your superiors view your activities?

Mr. **William L. Smith**. I have not spoken with the President, I have spoken with the Secretary and the Under Secretary. Everything I have said is their commitment to that job.

I have been told by the Secretary and the Under Secretary that until such time as there is a permanent position established for a confirmed Assistant Secretary, I have their support to carry out the program as has been identified to you. Therefore, I have every confidence that what we are proposing, and the manner in which we are doing it, will be maintained whether a new person comes in next week, next month or a year from now.

I am not sure I can remember all the parts you asked. Let me just make two points. Then I will pick up the pieces.

From a financial point of view, part of the problem was the fact that the problems grew. As you know, the budget process is always two years in the making. The reason I pointed out the complaints increase was to show you the impact of that.

Last year in fiscal year 1989, the Senate and the Congress was good enough to provide us with a supplemental of $790,000 to allow us to finish all of our work last year. We have an increase this year in our budget from $41 million to $45 million less whatever the sequester ends up with.

We are not sure what that does. We have requested for fiscal year 1991 additional funds hopefully at the tune of about $48 million.

The Administration has been responsive to the fact that we have an overwhelming amount of work to do and has provided us with the assurance that we will receive the resources that will allow us to do it.

One of the real problems is that the number of complaints that we have to investigate really takes a large number of people, and our budget is really related to the number of people we have.

Chairman **Owens**. Do you have a full complement of people?

Mr. **William L. Smith**. No, we do not.

Chairman **Owens**. Authorized for 800, you say?

Mr. **William L. Smith**. We had anticipated 820. The budget has allowed us to go up to 801. We are at 801.

Chairman **Owens**. You have 801 staff?

Mr. **William L. Smith**. Yes.

Mr. Chairman, I can't tell you what this morning's report is, but our attrition is high. We lost——

Chairman **Owens**. Yes, I know. You said you lost 400 and some?

Mr. **William L. Smith**. We were down to about 780 as we got to the month of September, then we had a very high recruitment period.

I think between September and November 15, we have an additional 24 or 25 people that have come on. I am almost confident, and I will check the record and submit what we have specifically for you, but I feel confident that I can say to you that we are pretty close to 800 personnel at this very moment.

That isn't to say—let me do this so that I can be accurate. I will show you for the record where we were in September, where we were on October 1, where we were on November 1 and where we are we will be by the time I get it back to you, it will be a few days, the month of November as well.

Yes, we have, in fact, increased the number of people we have.

The real problem we have is we had expected to go to 820 with the total amount we have. But if we sequestered funds, you realize, of course, that that impacts on the number of people that we will be able to have.

While we may be up at this point, one of the real problems we have is that with a high attrition rate we lose a lot of people. We may lose upwards of 10, 11, 15 people a month.

If it turns out we are impacted by the sequester, I will simply not allow the staff to hire at that point because we will have to forecast what we will need in resources.

Chairman **Owens**. How many people do you think would be ample to meet the increased work load that you have?

Have you estimated that?

Mr. **William L. Smith**. Mr. Chairman, I truly believe—I can't give you an honest answer because there is still homework that has to be done.

I think that what we have as a complement of 801, if we have the 801, I think we will be able to carry out for this fiscal year the objectives we have established.

We may not be able to get as many compliance reviews as the committee might like. I hope we would be able to have compliance reviews that are significant to the issues that the committee feels we should be pursuing.

Chairman **Owens**. The report was issued by the Education and Labor Committee about a year ago?

Mr. **William L. Smith**. December 1988.

Chairman **Owens**. Was it the overwhelming workload that kept you from responding until now. You said you plan to respond to it but you have not responded.

Mr. **William L. Smith**. I came to the Office for Civil Rights in March. I think the Secretary wrote you on March 2, or wrote Chairman Hawkins, that there would be a response to it. When I took over, we were in the middle of the regional management reviews.

It was my feeling that since the management reviews were focused on the very issues that you had raised, it made sense to allow the reviews to take place so our response could show you what we have in fact found and what we have done about it.

I think the timing of those oversight hearings is perfect because we are in a position to say to you, here are the things you have said we have done. Here are the things we are able to show you we have, in fact, been able to accomplish in light of the information you have provided us. And here, Mr. Chairman, is where we differ.

We have not been in a position to do that, but I would expect that given another month—by the 15th of December I should be able to have for you a point-by-point response that lays out every single solitary item that you have in the 28 findings and the 15 recommendations.

Chairman OWENS. Thank you.

Just one question for Mr. Turner, who is a long-time employee of the Civil Rights Division.

You made a statement that your department contributed to legal principles that have caused major social changes. I assume you mean in the area of race relations, the ending of discrimination. Why do you think there has been such an upsurge in complaints recently?

Why do you think we are having difficulties in universities with racism?

Why are we having more complaints now than before? Does it have anything to do with the priorities of the Administration, the fact that the previous President started his first campaign in Philadelphia, Mississippi, the place where three civil rights workers were murdered?

Did that send a message? Did that set off an escalation of racism in the country that has wiped out some of the gains we made with the legal principles you have contributed?

Mr. TURNER. I don't know anything about politics. The Civil Rights Division has a responsibility of enforcing the laws.

To the extent your question suggests that we have been or are presently deluged with complaints, I can report to you that is not the case.

Chairman OWENS. You are denying the testimony of your——

Mr. TURNER. No, I don't deny it. I said we, the Department of Justice. I don't know what the Department of Education is doing or what they are receiving.

Of course, I accept his representation that their complaint load has increased. My suggestion to you is that particularly in the area of school desegregation that 30 years after the Supreme Court declared separate but equal system to be unconstitutional, you would not expect to have as many complaints with all of the school desegregation decisions that have been handed down.

We are monitoring in our department some 400 school desegregation cases.

Chairman OWENS. You are not deluged, but you have more than you think you ought to have?

Mr. **Turner**. We have plenty to do. We try to describe in my testimony the nature of our job now and how it has changed. We are not filing a lot of school desegregation cases because most of the places that needed to be sued have been sued. We are monitoring to make sure that compliance is taking place under those court orders and to look to see when the court orders should be properly ended.

Chairman **Owens**. Thank you.

Mr. Hawkins?

Mr. **Hawkins**. May I say that I am very disappointed in the testimony. You seem to be proud of your record. You seem to be the only one who is proud of it, Mr. Smith.

I haven't read any report that commends you or says that you are doing a good job. The only—the reason the segregation assistance centers issued this report—have you seen it?

Mr. **William L. Smith**. No, sir.

Mr. **Hawkins**. That is typical.

Mr. **William L. Smith**. I lied. I have seen it, but I have not read it.

Mr. **Hawkins**. I think you are seeing it now. But seeing it and reading it and responding to its recommendations are three different things. But the point is, and you know it as well as I do, is enforcing the civil rights laws as they should be enforced—you can plead that you have this great increase in the number of cases as you started out, yet in answer to the Chairman's question, you defend the number of employees you have now.

You know that you have a decreasing number of employees, according to the recommendations made by the administration, and you know that to attack your failure to enforce the law because you don't have the staff to do it is embarrassing to the administration, and you refuse to tell us what type of staff you need, which is typical.

The Secretary did the same thing when he came before this committee. You seem to be operating on the theory that you can do more with less, which is a lot of baloney. We know that is nothing but double talk.

I think it is an insult to this committee to come before us and do that. We sent the staff out to regional offices in order to interview your employees, and they brought back this report, not from what they said but what your employees said; and we asked you more than a month ago in a letter which I sent to the Secretary on October 29th to reply to some of the recommendations and what had been done in response to the report.

And we have not yet received an answer. That was more than a month ago. Now, this committee has a responsibility of oversight, and we expect replies. We don't get any replies from you when we constructively direct specific questions to the office. How are we to respond then to what you say before the committee that what you are going to do in the future when you haven't done it up to this time?

Let me—I know the time is limited, but let me ask you one specific question. Maybe we can get one answer. In the case of the Palm Beach School District, you gave them $3.4 million as a grant for magnet schools. You had found, according to the regional office, there were cases pending at that time. Despite that, you made that award and two years later have not issued any findings, even though the regional office recommended that Palm Beach County be declared ineligible for such funding.

Let me ask you, have you done anything about that particular case when you found that there had been a finding of discrimination in the school district and despite that, you overruled the local office, the regional office in that district and gave them the $3.4 million? Can you, in that case, say that you enforced the civil rights law?

Mr. **WILLIAM L. SMITH**. Do you want me to only respond to that one question or to everything you have said?

Mr. **HAWKINS**. Do it together, if you wish.

Mr. **WILLIAM L. SMITH**. I have only been here nine months. I have no vested interest in the Office for Civil Rights other than the fact that I enjoy the job I am doing. I have discovered that there are people working their fannies off to do the job. I have had an opportunity to go to regions and find people there working.

I don't deny what your report said. Your report has provided us with an opportunity to take as systematic a review of every single region's problem, including headquarters, and we will be in the position to provide you if you desire the entire management review report that outlines step by step what we have found region by region.

Until such time as I am not there, I shall do everything in my power to assure you that if you have a question that you want answered, you will have an answer for it.

Mr. **HAWKINS**. When? You haven't done that in the past, and you know it. Now you say you are going to answer these—the response you gave to this report more than a year ago was inadequate and you know it.

Mr. **WILLIAM L. SMITH**. I wasn't there.

Mr. **HAWKINS**. It is a new day. When do you intend to answer that?

Mr. **WILLIAM L. SMITH**. I will have for your committee on the 16th of December a response to every single item in your report.

Mr. **HAWKINS**. When do you intend to respond to the letter of the 29th? When does the Secretary intend to respond to my letter of October 29, 1989?

Mr. **WILLIAM L. SMITH**. Mr. Chairman, I don't know because I cannot——

Mr. **HAWKINS**. It pertains to the Magnet School Award in the Palm Beach case.

Mr. **WILLIAM L. SMITH**. Let me tell you where we are on that.

Mr. **HAWKINS**. That is several years old.

Mr. **WILLIAM L. SMITH**. That is correct.

Mr. **HAWKINS**. It seems to me that we ought to have some response in the two years in which the office—I am not talking about you personally. It pertains to the office, its failure to respond at the same time that you are awarding this amount of money to a district that was definitely in violation.

According to your regional office, you denied an award to Los Angeles Unified School District based on one single case which was in dispute. In that case I agreed with you because you obviously told the school District that I was responsible for its failure to get that award, so you were very anxious, enthusiastically anxious to say that the school District, in which my district is located, failed to get its award because of a strict interpretation, which I agree with.

Why in other cases were you not as enthusiastic about enforcing the law as you were in that particular case? As you go across the country, this is only one case; but it is typical of what you have been doing, and this is not enough. And to say that you are proud of this to me is merely begging the question.

We at least are entitled to a response and to an explanation, and then we can talk intelligently.

Mr. **William L. Smith**. That is fair, Mr. Chairman.

Let me respond to the first question having to do with West Palm Beach. There is a group that has gone into West Palm Beach—first you need to know something about the manner in which we have worked with the Magnet Schools Program. There had been a policy, and it is in force at this time, that if we have not sent out a letter of finding citing violation to the recipient, that still allows the recipient to be in competition until such time as there is, in fact, a letter of finding that they have received.

There has not been a letter of finding submitted to West Palm Beach and therefore even though the Regional Director had, in fact, not signed in, but sent a memo saying I don't feel it is appropriate to sign, we have not agreed to send a letter of finding and therefore as far as we were concerned, West Palm Beach is still eligible.

We have a team there that will have their first meeting 10 December at which time they will begin the process of corrective action. So that is in place, and we will be in a position to respond after the 10th of December as to the status.

There may be a minute-to-minute report that I have not received. They have already met with them. They have been down and met, but they will start the hearings, I think, on the—they are working on the settlement starting the 10th of December, so we should be able to respond to you for that.

I don't know who told you in the Los Angeles case that you had any role in it. I met with your staff, and when they asked the questions as to why they were, in fact, in the situation that they were in, it was because a letter of finding had already been sent to them, and they had, in fact, already worked out a settlement that had not been approved by the school board.

It was through the good graces of your office somehow that convinced the school board that they, in fact, should comply with the plan of action and as a result, Los Angeles did receive its funds. But at no time were you ever made the person that was involved.

I think your county would have to attest to the fact that we did have a set of meetings and at no time was your name ever brought up.

Mr. **Hawkins**. It was the San Francisco Regional Office. We agreed with you, and we told the District to come into compliance.

Mr. **William L. Smith**. And they did, Mr. Chairman.

Mr. Hawkins. We were on your side. Apparently nobody in Florida was on the side of the law. They got the $3.4 million, which they have enjoyed regardless of what may happen hereafter.

Mr. William L. Smith. And they have agreed——

Mr. Hawkins. That was a recommendation made by the regional office, which recommended that they be declared ineligible for funding.

Mr. William L. Smith. The regional offices has the right to make a recommendation to headquarters. Headquarters has legal staff with responsibility for looking at any single finding that any region brings in to determine whether or not it can be enforced, whether or not they have evidence necessary to support the case, and whether or not it is an appropriate time to take action. Those are the steps we normally take any time there is a violation and we find recipients do not want to take corrective action.

We have three letters of findings. First, the regions have the opportunity to send directly to the recipients saying you are not in violation, congratulations. The second letter of findings says you had a violation, we cite the violation, but you have agreed for corrective action. We are working on a plan of corrective action, and we are notifying you you now have corrective action and you are off the hook.

For the third, it either goes to administrative action or to the Department of Justice. We try to give recipients every opportunity to deal with whatever we find. We have tried to be as even-handed as we can. You have an argument with regard to Palm Beach. It is long overdue. I cannot deny that.

Mr. Hawkins. After two years, your explanation is useless. If you have allowed them to enjoy this money for two years and you still don't know whether they are eligible to receive it or not, I say that is damn poor management, and I don't see how you can get around it.

Give us a better explanation, and we will give you the time to give us the explanation and to make all the investigations you want, but we do want an answer as to that.

If I appear to be a little abrasive, I don't intend to do that. It is nothing personal, but it seems to me that we are not communicating very well with each other and that we don't have any particular standard whereby we can judge whether you are succeeding or not.

All the reports issued say you are not and that segregation is on the rise. Now we have another crazy idea, Choice, which is going to contribute to that re-segregation and is being sponsored by the administration of which you are a part that we cannot tolerate, not under our system of government in this country.

If you wish to respond——

Mr. William L. Smith. Mr. Chairman——

Mr. Hawkins. I have made my comment. You have full privilege to answer in any way you wish.

Mr. William L. Smith. I thank you for not making it personal. I did feel a pinch of abrasiveness, but I didn't feel it was personal, Mr. Chairman.

I can only deal with the present. I cannot deal with the past. I will say to you that I agree with you that on the matter of Palm

Beach, it appears that something has occurred that has not, in fact, made the system as successful as it ought to be.

I have said to you that we now have people in Palm Beach who are working with the school system to ensure that the violations that have been cited have, in fact, been corrected.

I cannot—I have no way of responding to what they did a year ago with funds or whether it was, in fact, valid or invalid. I will be in a position to defend whatever actions we are able to take from the 10th of December on. I cannot, and there is no way for me to respond to anything that happened in the past.

It is clear that you see it as you see it, and I cannot argue with it, so there is nothing I can do with that.

With regard to Choice, we are looking at policy implications for Choice. The President and the Secretary have said that in no way would they be supportive of any program that would cause re-segregation.

Our staff has responsibility for making sure that whatever steps the Secretary takes with regard to Choice is consistent with Title VI, Title IX, Sections 504 and Asian discrimination. And we will do everything in our power to ensure that the Department of Education is carrying out its objectives consistent with whichever of the laws may, in fact, be questioned.

Other than that, I am not sure that I can respond to the issue of Choice. We have to take it case by case. If we see a particular place that has a Choice program and there is a complaint relative to it, we will be the first to be there, as we have, in fact, carried out the responsibilities with the Asian-Americans discrimination.

Once that is accomplished, we are in a position to let the Secretary know whether or not there is evidence that a Choice program may, in fact, be in violation of any of our laws. We see that as our responsibility and stand ready to do that.

I can only speak to what we are in a position to do now, not what they did years ago. The staff report, as well as the evidence that you have, implies that there are things that we need to clean up. We are in the process of doing that. We can only do it one step at a time.

Since March 1989, we have tried to do two things to make the Office for Civil Rights a more manageable organization. When Chairman Owens asked the question with regard to the lapsed funds as a case in point, I wanted to say to him, yes, two years ago we did lapse about $900,000. Last year we lapsed about $62,000. This year it shows $400,000 that was not, in fact, spent.

I can assure you that that $400,000 has been spent because $197,000 of it is for contracts for the computers that will go to Regions 4 and 9, which need them badly.

Travel costs have not yet been fully calculated in our finance department, but I can assure you that every nickel of Fiscal Year 1989 money was, in fact, spent.

One of the reasons I am not in a position to say, when you ask the question, do you need additional staff, we have not managed the Office for Civil Rights as effectively as we could. I think the steps we have taken to shore up what we are doing will help us to get more done with the people that we have. I am not an advocate of doing more with less.

We are looking at the best possible way to manage the Office for Civil Rights, and we have found there are examples of things done in some regions that will be beneficial and more cost-effective for other regions.

It doesn't mean we will negate any of the responsibilities we have for carrying out those complaints or those compliance reviews, but there are some things that we are able to do that we have not been able to do in the past that we think will be helpful to us.

Mr. HAWKINS. Thank you.

Chairman OWENS. Mr. Payne?

Mr. PAYNE. Thank you, Mr. Chairman.

There was a statement made by the committee in one of its major findings that a review of the OCR's case processing statistics revealed that the agency has not vigorously enforced laws protecting the rights of women and minorities in education since 1981.

You have only been there for nine months; whatever——

Mr. WILLIAM L. SMITH. But I have staff that have been there for 20 years. We ought to be able to answer every question you have.

Mr. PAYNE. I am glad you mentioned that.

Mr. LITTLEJOHN. James Littlejohn.

Your question is with regard to one of the findings. Would you repeat that, please?

Mr. PAYNE. I wanted your reaction to a statement made by the committee in its findings that simply revealed that the agency had not vigorously enforced laws protecting the rights of women and minorities since 1981.

I thought you might have an opinion about that.

Mr. LITTLEJOHN. There are a couple of points.

First of all, with regard to complaints, we process all complaints and those where we have jurisdiction we investigate, whether they are Title VI, Title IX, Section 504. Most of our complaints are Section 504.

Another factor I think during that time period, a good part of those years we were under the Grove City limitations with jurisdiction and Title IX was a particularly difficult area to establish jurisdiction because we could not find the Federal money in the program.

With Section 504, we had a much easier time with regard to education of the handicapped funds that went into the public schools.

The Title VI issue, to some extent there was a jurisdictional problem.

Another factor that we discovered in doing the management review was that the time frames that we had been working under tend to cause the regions to select compliance reviews, not complaints, but compliance reviews that they can finish within those time frames.

Many Title VI issues such as ability grouping and other issues are quite time consuming.

We agree that that is a problem, but if you look at the overall statistics, the complaint investigations were across the board.

Whatever came to us we did.

The compliance reviews where we had more discretion, we tended to pick up Section 504 reviews during the years of Grove

City rather than take on Title XI and Title VI reviews because the difficulty in establishing jurisdiction on issues under those statutes.

We have identified the need to increase our compliance review effort in both of those areas.

Mr. Payne. The Secretary of Education then listens to what you say? How would you grade yourself from A to F, if you were an elementary teacher?

Mr. Littlejohn. I was a high school teacher at one time. I have to say that after visiting all ten regional offices and spending two or three days in intensive interviews with regional managers and the staff, they certainly get an A for effort, and I hope that in the headquarters we get at least a B-plus for working with them.

We think we need to do improvement in headquarters to make the regional operations work better.

As far as the issue of whether we have enforced with regard to women and minorities, I think with regard to complaints we have done an A job.

With regard to compliance reviews, I would give us a C or C-minus.

Mr. William L. Smith. I have a draft copy of the response that we are preparing for the total report with regard to the question which tends to reject the notion that we haven't vigorously enforced, and then it goes on to explain why.

I would be pleased to submit, although it is in draft—let me check and see if I can do that.

May I suggest that when I send it do the committee on 16 December that I will highlight that so you will have our response to it.

[The information referred to is retained in committee files.]

Mr. Payne. Thank you.

It does remind me of the report cards. I am glad you brought up both sides. One side talked about cooperation, dependability and initiative and all that. Then the other side is whether you can read or add or spell.

Many times youngsters have all of the goodies, but they just can't read or spell, so you have to fail them on the side that unfortunately counts.

I see that in your opinion, the desire was there, but the results were a little lacking. I guess that is how we could more or less summarize the past eight years.

Mr. Littlejohn. I think we have done an excellent job of investigating complaints.

Because of gentleman and complaints under the Adams Order, we have had problems in carrying out exhaustive program compliance reviews.

Dr. Smith testified that with the increase in complaints, we are going to have difficulty maintaining the compliance review levels that we have had even in the past.

Mr. Payne. I am also kind of curious about the results. I guess if you have very few citations that shows that you are doing a good job; I guess you could look at it that way.

I would look at it the other way: The committee report states that, "Letters of findings which cite schools for violations of the Civil Rights Act must be first approved by the OCR national office, and regional staff consistently criticize the inordinate time taken by headquarters staff to approve issuance of violations."

Then it says, "Of 112 draft letters of findings submitted to headquarters in 1987 through June 1989, only 7 were approved. The vast majority, 92, were resolved with a violation corrected, LOF."

Could somebody explain that to me, why only 7 cases were found serious enough to issue a violation and all the rest just happened to warrant only a little tap on the hand?

Mr. **William L. Smith**. Mr. Chairman, I go back to a comment I made in my opening statement with regard to the nature of our work.

We try to be as even-handed as we can with regard to the complaint and to the recipient.

One of the things that we feel very strongly about is that our job is to investigate any complaint that comes up.

We are to do it as thoroughly and as comprehensively and as honestly as we can.

As a result, it means that when the effort is made to do the investigation and you submit to the recipient that there is, in fact, a violation, one of two things occurs.

The recipient determines that they do not believe they have a violation and do not feel that they wish to respond to the fact that it is occurring. That says to us that we have no way of having them voluntarily take corrective action.

When that occurs, we simply move it into the letter of finding and it comes to headquarters.

I will respond to your headquarters question in just a second.

We try diligently to deal with whatever actions a recipient is in a position to take to ensure that the violation is corrected.

We feel that that is probably one of the strongest points that we have.

We agree that there may be many who do not agree with that as a policy.

We find that it does, in fact, help us get the recipient to acknowledge the violation and to take corrective actions.

We also have discovered that when you do a violation letter of finding and you submit the letter of finding, you have an adversarial relationship as opposed to a cooperative working relationship.

It takes on a totally different tenor and deals with the question of enforcement.

Anytime a recipient is notified that there is a violation found and they have the option to voluntarily correct it, we provide the staff to work with them to correct it.

That is one of the reasons why a number of LOFs that have come forward have come forward with corrected violations as opposed to letters of correction citing a violation.

We have taken a straightforward position with regard to what a recipient is able to respond to.

Mr. **Payne**. It is a soft approach, but wouldn't we tend to see reoccurrences if there is no penalty to the person who was proven to have discriminated?

Mr. **William L. Smith**. If we are talking about an individual complainant, if an individual has a complaint with the recipient that receives Federal funds and the recipient is willing to make the corrections to eliminate the violation, it seems to me we have solved the problem.

Mr. **Payne**. Well, I know one thing: If you could speed and not get points or fines, you might tend to speed again more easily than if you got fines and points.

I just wonder whether by this policy, we will solve this particular individual incident, maybe we are just not dealing with the systemic problem. We are sort of going from the particular to the universal, and this approach may not be having very much of an impact on the overall attitude of violators or potential violators.

How do you feel about that? If a person or organization could violate people's rights without any penalty, they will just keep doing it if you feel like doing it.

Mr. **William L. Smith**. I made a mistake regarding Los Angeles and show you what a corrected letter of violation provides.

When you have a magnet program and the letter of finding has been sent and a letter of finding had not been sent to Los Angeles, I just remembered, because they were, in fact, working together to take corrective action on identifying all of the handicapped kids in Los Angeles.

If the letter of finding had gone to Los Angeles, it would have prevented Los Angeles from making the correction and be able to apply for the magnet schools program.

That is the best single example that I can give you of what a corrected violation provides.

It left the option open to Los Angeles to not, in fact, have the violation because the very fact that we were in the process of dealing with them—no, I am wrong—they had, in fact, gotten a letter. They had not gotten the letter.

Had they gotten the letter, they would not have been eligible for the magnet school program.

They were still in the process of negotiating corrective action.

The school board had not taken the action to close it and because they had not taken the action to close it, we were in the process of sending them the letter of findings and it was that particular case that I am pointing to that allows us to say that the recipient had the opportunity to be able to compete as did Florida, because we had not come to closure with the letter of finding.

That is the best example I can give you.

Mr. **Payne**. I know my time has just about run out. I just have a problem with the OCR's attitude. It seems, that has come in from what I have read beginning in 1981.

First of all, at that time, you had 1,099 full-time employees.

In 1987 and 1988, you had 820. Now you say you have 801.

In addition to that drastic reduction of 20 percent of the workforce, which is one-fifth of the full-time employees, the department has never, in nine years spent its total allocation. Today, of course, you are going to look at how much travel went on to see if you will spend it all.

But the question that the department from .4 percent to 6.2 percent of the budget which had been drastically reduced where full-time employees have been cut by 20 percent still never spent its total amount, shows there was no interest in doing the job.

It is very clear—you can't tell me that people want to enforce a law when they don't use all their resources at their disposal.

Finally, the OCR's national office did away with the quality assurance program which was transferred to regional offices in 1985. Compared to the counterpart Federal compliance program with the United States Department of Labor, OCR has conducted relatively few compliance reviews since 1981.

OCR staff, in a region with a large Hispanic population, noted that no one on the staff with technical assistance could speak Spanish.

Also, formalized training at OCR was virtually disbanded in 1981 when the Denver Training Center was closed.

The computerized data management program was plagued with problems to the point where they couldn't effectively conduct an analysis of alleged wrongdoings. There is a total conspiracy of attempting to deny people's civil rights and this department has not lived up to what it is supposed to do and I think it is just appalling.

I don't have any other questions. You don't need to respond to that. I am sorry if I took too much time, Mr. Chairman.

Chairman OWENS. Mr. Hayes.

Mr. HAYES. Thank you, Mr. Chairman.

My two colleagues to my right, especially my Chairman, have been so forthright and in this inquisition of Mr. Smith, until I was going to, if he needed more time, relinquish my time to him, because I have heard nothing in the testimony, being very honest, to dispel my opinion that the backward march that we are taking in the whole field of civil rights as it relates to education is no accident, it is by design. I certainly wouldn't want to be in your position of having to act out that kind of a program.

Mr. Smith, when you look at the structure, you, as acting Assistant Secretary, you have been in that capacity for nine months. To whom are you directly responsible in that capacity?

Mr. WILLIAM L. SMITH. The Secretary.

Mr. HAYES. Are you free to make decisions that the Secretary would make?

Mr. WILLIAM L. SMITH. Am I free to make decisions that the Secretary makes?

Mr. HAYES. That is right. Who do you take your guidance from?

Mr. WILLIAM L. SMITH. The Secretary and the Under Secretary of Education.

Mr. HAYES. The Under Secretary of Education?

Mr. WILLIAM L. SMITH. Yes. You said guidance.

Mr. HAYES. Yes.

Mr. WILLIAM L. SMITH. Yes.

Mr. HAYES. Your sense of direction.

Mr. WILLIAM L. SMITH. From the Secretary and the Under Secretary.

Mr. HAYES. Did it ever occur to you with having to work in that kind of capacity in the absence of a Secretary, that this conceptually seems to indicate a de-emphasis on the importance of that department?

Mr. WILLIAM L. SMITH. You mean the absence of an Assistant Secretary.

Mr. HAYES. Or Secretary?

Mr. **William L. Smith**. Mr. Hayes, I am not sure I can answer the question directly, but I will try. I think the White House and the department principals are attempting a nationwide search to fill both of the positions of the two of us acting in those positions today.

Mr. **Hayes**. Are they open to suggestions?

Mr. **William L. Smith**. I cannot say that, but if you have one, I would be more than willing to send it back to them. I will take it today if you would like.

I think that there are a number of things that are occurring. I think that this administration has been in office since January. Your report has been available to us since December of 1988. And I think that if there is any indication that this administration at the Department of Education, which represents the President, is genuinely interested in making change, I think you have to read what we will have as a response that will point out to you those things that are in fact being done as a result of, one, a new administration, and two, the inputs that this committee has made to the Office for Civil Rights, which has been taken very, very seriously.

I wish that we had had time enough to complete our response to all of the findings and all of the recommendations so that they would have been available to you before this hearing, but I will say to you, sir, that we will have those available to you and I think you will be as—you may not be satisfied, because I think that in the nature of our work, nobody seems to be fully satisfied because everybody feels there is more that can be done. But I think you will be in a position to see that there has been movement.

I feel confident as I speak to you today, although I am an acting Assistant Secretary, I have the utmost confidence in the Secretary and the Under Secretary to carry out that policy. There have been no quarters held in getting that job done.

When I took it, they told me what I could expect and I have found that they have lived up to everything that has been there and I feel confident that I can put that on the record. You will see changes that have occurred.

Mr. **Hayes**. I notice in the OCR limitation on investigation, re the question of race, there was a clear perception among some of the regional office staff that certain issues were off limits and could not be investigated.

Most of the issues involved race discrimination. Among such issues were discrimination involving disciplinary action and the placement of black students in special education programs. It was reported that the National office would not approve investigation of such cases unless they were horror stories.

You know, you are not dealing with fools. I am not blaming you, but this administration has to understand that you can't cover or hide what is reality or what is going on in this whole area of segregation in the educational system. We have to accept the fact that first there is existence of it and second, have efforts to do something about it.

I wonder whether or not you in your position have the latitude and authority to approach this problem to try to clear it up. I see that young man second from the right here, he keeps frowning and wiggling. He has some problems with the question we are asking.

Mr. William L. Smith. He is from Illinois.

Mr. Hayes. He seems to be in pain.

Mr. William L. Smith. He is one of our regional directors. Would you like for him to respond? He is certainly available.

Mr. Hayes. I mean sitting at the table.

Mr. William L. Smith. That is the Justice Department, sir.

Let me just say to you that I think that we have a problem and I have tried to say it as discretely as I can. We have a problem because the time frame has in fact, not only in fact affected, but captured our lives in the Office for Civil Rights.

We must do something about the time frames, and one of the things that I am hoping we will be able to do in the near future is have a meeting with the Office of General Counsel and the Department of Justice to talk about whether or not we can afford to continue to honor the Adams order. As you know, it is in litigation.

We, during the months of February and March and April, will be responding to the court because of the actions that have been taken. Our belief has been that we wanted to try—the belief has been that we wanted to try to maintain the time lines so that if there were appeals and the like, people would at least feel that the Office for Civil Rights is doing something that is consistent with the Adams time frames.

The truth of the matter is, it is killing us. We need to deal with the fact that we can't continue to operate as we have.

When you asked about what areas we have not been able to pursue, while it may not have been verbally stated, it was implied, it will cost us in terms of dealing with that particular case because it doesn't in fact stay within the time line. If we expect to have complex compliance reviews, there is no way for us to be able to meet the Adams time frame, and therefore we have to deal with that. Until we deal with that, you will be able to beat us to death and some of it gets bloody.

Mr. Hayes. Mr. Turner, in your statement you say, "In recent years we have been in the vanguard in our efforts to eliminate a dual system of higher education."

How long have you been in the vanguard?

Mr. Turner. That is referred to the last—1974 was the first higher education case we filed and we have been litigating virtually nonstop since then, Congressman.

Mr. Hayes. I was reading further the statement. I was trying to find a victory, that you had one, several cases, particularly, in the three States mentioned. I didn't find it. Most of them are still pending.

Mr. Turner. The three major ones are still pending: Louisiana, Mississippi and Alabama. They are in various different postures.

If you would like to discuss any individual one, I would be glad to take it up.

Mr. Hayes. I don't want to take up the time. But I don't want us to be left with the wrong impression that we are making great strides in this effort.

I think there has to be, first, recognition of the fact that there is a great waste of talent out there because we aren't educating them. Some of that reason is because of race. Now, we have to do something about it.

One of the best defenses that this nation can ever have is not found in whether or not we can explore outer space or build a new bomber, but in whether or not we can educate our young irrespective of their race, creed, color, sex or financial standing.

Chairman OWENS. Mrs. Lowey, I understand you have a statement in addition to questions?

Mrs. LOWEY. Yes, Mr. Chairman, but I will ask unanimous consent to include my opening statement in the record.

Chairman OWENS. Without objection.

[The prepared statement of Hon. Nita M. Lowey follows:]

PREPARED STATEMENT OF HON. NITA M. LOWEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I am extremely pleased to join you here today for this extraordinarily important hearing.

This hearing goes to the very heart of what we stand for as a nation. Our nation stands for equal opportunity and for the ideal that every individual should be given an equal chance to succeed.

There can be no doubt that the number one ingredient in success is education. And as we enter an age of increasing complexity and technological sophistication, education has become more important than ever.

We know that our education system is failing many of our students—that they are not prepared to face the challenges of the future because we simply did not provide them with a quality education. This is one of the tragedies of modern American life that must be corrected.

But there is another reason why some of our students are not receiving an equal chance. They are not receiving an equal chance because they are victims of discrimination. They are being denied the opportunity to achieve, to contribute, and to succeed for no other reason than their race, their age, their sex, or their handicap. This also is tragic and must be corrected.

Congress created the Office for Civil Rights (OCR) in the Education Department to insure that our students would receive equal opportunity in their educational pursuits. But sadly, OCR's record is far from what it might be. The committee has found that OCR has not vigorously protected the rights of women and minorities—and that it has actually thwarted this goal in many instances.

This cannot be tolerated. If, as a Nation, we do not insist on equal opportunity for our Nation's students, we will have abandoned the fundamental principles on which our Nation is based. And we will all suffer from the consequences of having permitted the obstacle of discrimination to stand in the paths of so many Americans who are yearning to contribute to our great Nation.

The Bush Administration has emphasized its commitment to education. But that commitment must be a commitment to the education of all American citizens. It must include a full commitment to upholding our Nation's fundamental civil rights laws.

I am hopeful that the Bush Administration will act quickly to restore OCR to the role that Congress intended—the role of vigorous protector of our Nation's women and minorities. I am hopeful that the Bush Administration will transform OCR into an agency whose commitment to the principle of equal opportunity is unquestioned and no longer the subject of debate and controversy.

But that will take more than words. It will take actions. I look forward today to the testimony of the administration witnesses with the hope that they will detail the specific actions they will take to fully protect equal opportunity for our Nation's students. For there are few tasks in America today that are more important to our children, our Nation, and our future.

Thank you very much.

Mrs. LOWEY. I am extremely pleased to join you here today, Mr. Chairman, for this extraordinarily important hearing, because the hearing goes to the very heart of what we stand for as a nation. Our nation stands for equal opportunity and for the ideal that every individual should be given an equal chance to succeed.

I have several questions after listening to the testimony this morning for acting Assistant Secretary Smith and for your associates, or whoever cares to answer it.

You have contended that OCR has done a good job. In fact, at one point Mr. Littlejohn said, "You have done an excellent job ensuring equal opportunity for all Americans." On the other hand, the committee found that OCR closed 58 percent of all cases with a finding of no violation from 1983 through 1988.

Now, of course we can't expect you to find a violation when there isn't a violation, but the committee also found that OCR was almost twice as likely to find that there was no violation in cases alleging race or age discrimination than in cases of sex or handicap.

Could you explain why this is in fact the case? Could it be that OCR has not faithfully executed its duties?

Mr. WILLIAM L. SMITH. I am kind of stymied. I guess the primary reason I am stymied is that a finding is a finding. If you are looking at a complaint and the evidence does not support the fact that there is a violation, then there is no violation. I am not sure I understand the question, so——

Mrs. LOWEY. Well, the actual statistics were that in cases of race, 84.9 percent were found to be no violation. In cases of sex, 48.2 percent, no violation.

I just wonder if there is some problem in pursuing cases of the kind we have discussed. It just seems strange to me—again, we don't want you to manufacture violations when there aren't violations—but I wondered why in certain areas you seem to have great success and in other areas, you don't.

Mr. WILLIAM L. SMITH. I really don't know. I don't know whether the cumulative time frame that you are talking about includes the Grove City period when we found that in a number of cases, we had no jurisdiction to follow the case and, therefore, we closed it.

I am not sure what the specifics are, but let me say this. if you have a specific and you wish a response for the record, I would be more than pleased to submit it.

Mrs. LOWEY. I would appreciate that. Thank you. The period was 1983 through 1988. But I would be happy to continue the discussion at a later date.

Mr. WILLIAM L. SMITH. Mr. Littlejohn feels that he may be able to give you a more precise answer.

Mr. LITTLEJOHN. All cases we investigate go through the same process. Each regional office has a unit of legal staff including a chief civil rights attorney that must review and sign off on every case to make sure the evidence supports the finding. That is one thing, race, sex or Section 504 handicapped.

Another point to consider and nobody knows why statistics have come out this way, but I am confident after doing management reviews, that our staff is doing a thorough job of reviewing the cases and reaching a correct legal finding.

The Section 504 regulations are very specific with regard to Title VI, for example. There are lots of procedural and other kinds of things that must be followed and when these are not followed, it results in a fairly direct violation.

Title IX is more specific along those lines and Title VI is less specific. This could be a factor. No one can say for sure.

Mrs. **Lowey**. Thank you.

The committee also found that OCR staff admitted to encouraging complainants to withdraw or narrow the allegations contained in their complaints. To me this is absolutely outrageous. Representatives of the Federal Government were in the position of attempting to persuade citizens of this nation not to pursue their rights under the law and to accept real or perceived discrimination.

In addition, many OCR staff apparently are operating on the assumption that certain issues, particularly relating to race discrimination, are not appropriate areas to investigate.

What have you done to correct these serious problems? I know you have been there only nine months. Have you investigated the charges that were very specific relating to employees who sought the withdrawal or narrowing of charges? Have you issued any directives to make clear that this is not permissible? Have you made it clear to all of your employees that they should investigate all claims of discrimination under the laws of the United States?

Mr. **William L. Smith**. First, this is probably one of the places that creates some sensitivity. We have no evidence as to who it is that has been identified as having a complainant withdraw a complaint.

I think that our response has been if you tell us what region, who the players are, we will thoroughly investigate it, but the committee did not provide us with any information other than the fact that people have said—so this is a very sensitive issue. We have no evidence that that has occurred, because it is illegal and it would create serious problems.

But if the committee has evidence as to what region it is and who the players are, I will guarantee you that we will thoroughly go into an investigation of that complaint from this committee. We do not have that.

Mrs. **Lowey**. You are aware, however that there have been allegations?

Mr. **William L. Smith**. Yes. I read that report.

Mrs. **Lowey**. Therefore, even without the specifics, and I know that the committee will have further discussions with you regarding the specifics, but without the specifics, have you issued any directives to be sure that this is not the case and if it were the case, that it would not be the pattern in the future.

Mr. **William L. Smith**. Let me have Ms. Lewis——

Mrs. **Lowey**. Have you yourself issues any directives to this statement to respond to this allegation?

Mr. **William L. Smith**. You have to understand the mechanics of the office. Every piece of guidance and every directive that I put forth comes as a result of a thorough analysis of whatever the problem is. That is Ms. Lewis' job. She provides me with whatever data I must decide upon, so I was going to let her tell you what steps have been taken.

You have to understand the process. If this committee or anybody says to me, there are in fact employees who have gone to a complainant and said to a complainant, "You ought to withdraw it," I want to know that. I have no evidence that that has occurred and until such time as I have facts before me, I cannot respond to that.

Mrs. LOWEY. I would not expect you to respond to an individual complaint if you don't know the specific name or specific person, but if there have been allegations reported to you from our committee, I assume it would be appropriate to issue a directive stating your overall policy for the agency?

Mr. WILLIAM L. SMITH. Yes. I would answer the question—Ms. Lewis may have several policies—I would answer the question "no." Until there is evidence that it is in fact occurring, I would not put out a directive because I have no reason to. I would want to be sure that each regional director takes care to make sure that they are not accused or any person on their staff is accused of it. But I wouldn't put it in writing.

Mrs. LOWEY. Perhaps we can pursue it at another time.

Mr. WILLIAM L. SMITH. I think there are many people who perceive that there were areas that were taboo. That is critical. I have looked at the questions raised by the committee both in terms of its finding and its recommendation. It goes back again to the question of time frames.

The system that has been used to date is that your rating is based on meeting time frames, so that time frames are part of the performance agreement from the inception. So you have a system which is driven by a time frame and every regional director and every staff person and management person wants to be sure that they are in fact meeting whatever goals and objectives they have for their performance agreement.

The tragedy of it is that what occurs is they may not decide that this is a case we can take because this is not going to allow us to meet our time frame. That is why I want to go after the time frame to do something about it, so nobody is in the position of not having the time frame to carry it out.

I think Mrs. Lewis is ready.

Mrs. LOWEY. I would just as soon pursue that at another time. I want to pursue another line of questioning.

I understand that the policy of OCR since 1981 is to close most of its complaints and compliance reviews in which violations of law have been found by means of a letter of finding indicating that the violations cited have been corrected even if the school district has only promised that it will take action to correct these violations. Yet, what has concerned me in reviewing the report, and you have acknowledged the same thing in your testimony, is that you rarely follow up to find out whether the violation has been corrected.

The committee report notes that also monitoring has been done in part because the regional offices are not credited with conducting meaningful follow-up of such cases.

First of all, can you comment on the propriety of issuing "violations corrected" letters of finding when you don't know if the violation has been or will be corrected? The committee has recommended that you do away with that practice. Will you do so?

Mr. WILLIAM L. SMITH. A letter of finding, as I mentioned, citing a violation means that our staff has investigated it, found fact that there is a violation, and has notified the recipient that there is a violation. The recipient must in fact make a decision we want to do something about correcting that violation, or we are not going to because we do not feel it is a violation.

When that occurs, one of two things happens. If the first occurs, we don't put out the letter of findings until we have assurances that they will be able to carry out the corrected areas. It is true that we did not have before this the opportunity to provide each of the regions with citations for monitoring. That has been corrected. That is already in place.

When I said that our case monitoring process now takes into account monitoring, it is true. We have made monitoring a major part of the compliance activity so that that is also built in.

One of the things, one of the previous speakers talked about our comparison With the Department of Labor compliance review group. When we looked at what they were doing, and calling it compliance reviews, we were able to broaden our base so as to include monitoring and the magnet school program and the vocational education program as part of the compliance analysis process so that we now are in a position to include all of those as part of a compliance activity.

Mrs. LOWEY. Thank you.

Another finding of the committee which is directly related to this discussion and is very disturbing to me is that the committee has found that OCR's presence across the country is little known, little felt. No one knows they exist. I don't know where the money is going, particularly in some of the communities that are most in need of its assistance.

It is my understanding that when Congress created OCR, it did so in order to create a visible agency to which aggrieved parties could turn to when they needed help in ensuring fair treatment.

It is hard to understand how individuals will know who to turn to when they don't know it exists. What can OCR do, what are you doing, what are you planning to do, to help get the word across that you do exist, particularly to groups protected under civil rights laws?

I think it is important that people know that you exist so that they have a claim, they know who to go to, who to reach out to, how to get the help.

Mr. WILLIAM SMITH. We have tried to respond to those findings and will have that for you on December 15.

There has been a dilemma with regard to our presence and the extent to which we are known. That becomes a question of how do you use technical assistance for those persons who request it, and how do you use technical assistance from an OCR-initiated process? That has been one of the items that we—because it does take money.

That is one of the items we have been looking at. We have tried to go to conferences that have either recipients or organizations that serve complainants. We try to provide for them in an information booth material that allow them to deal with their individual constituencies back home with regard to what we do in civil rights.

We have put all of that in each of the conferences that we go to. We pay a conference fee, we do whatever, send the people on travel. We try to get it all together. We have not been successful in broadening our base, except through the publicity, as is the case in

Chicago, when the Chicago schools finally signed the agreement with the Office for Civil Rights so that they, too, could apply and receive magnet school funds.

We are thinking about some ways that we may be able to do that. I have made that at this point a secondary source. I have looked at what we have as resources, and I have tried to have our senior staff direct those resources at those areas that are most critical, that by law we must carry out.

Until we are able to deal with the time frame problem and get a sense of how to manage the total number of complaints that continue to increase, we have not tried to deal with the question of how do we make our presence known. That is a process we hope we can in fact improve.

Mrs. Lowey. Let me say in closing, Mr. Smith, I believe you referred to the fact that it takes money. My colleague also referred to the fact that the agency has repeatedly turned back money.

I think perhaps it is not just money. It is will, it is desire, it is a commitment. And it is my strong hope that the Bush Administration, and it has to start from the top, will take the issue of equal opportunity and education very seriously.

It seems to me that one way to demonstrate that kind of commitment would be, first of all, to be more aggressive in pursuing complaints and compliance reviews. But OCR can and should also make itself more available to local communities and play a more public role in educating the public about their rights to equal education, to equal opportunity, because this is the key to our future.

As we see the walls tumbling down in Berlin and we realize there has to be less emphasis on pursuing the race for the best weapon in the world, unless we are focusing on equal opportunity and giving every youngster in the world the opportunity for that education, we are not going to go forward. I would hope you and your colleagues would take these responsibilities seriously, because our committee looks forward to working with you.

I thank you very much. I feel as if we are letting the Justice Department off the hook. If we have time, I will go back. I have taken enough time. Thank you very much.

Mr. William Smith. You have our support with regard to carrying out this obligation.

Chairman Owens. Mr. Smith?

Mr. William Smith. Yes.

Chairman Owens. The other Mr. Smith.

Mr. Smith of Vermont. I think I will limit myself really to a short comment. If it provokes a response, that is fine. Generally speaking, I want to associate myself with the comments I have heard from my colleagues since I have come in, Mr. Payne and Ms. Lowey.

It may be that they are now willing to suspend their disbelief in the interim. I will tell you I am. We have got about about two and a half weeks. I understand, I think, that you are in a difficult position, to put it mildly, in that you are being asked to be accountable for and to explain 10 years of policy, or the better part of 10 years of policy, the remnants of which you inherit and are asked to do something about.

I appreciate that is a difficult quilt to patch together. From this side of the aisle, I want you to know there is at least one member of this committee, and I suspect I am not alone, for whom the responses in the December 15 report are going to be very, very important in terms of our ability to assess positively the department's seriousness of intent with the enforcement and protection of civil rights.

You know, I am sure, that the education summit that the Governors, that some extent this committee, many people are talking about different constructions for educational excellence. The context in civil rights, among other things, is not only a legitimate, but an essential core function of the Federal Government.

We wouldn't be able to create the climate, the kind of excellence we need in our schools if we don't have confidence that the Federal Government on the Executive side is 150 percent committed to ensuring those civil rights are protected. It won't happen. So, it is that important, from my point of view.

Finally, a separate issue. You asked to take recommendations back for people who are applicants for the job. I would tell you I have no recommendations about candidates. I would tell you if there are people who receive advice, I would simply be delighted if you were to share with them that there is one Republican member on this committee who hopes that how an individual feels about questions of choice, sex education, abortion, are not criteria of the positions that we are talking about.

Thank you.

Chairman OWENS. Thank you, Mr. Smith.

Is there any member of the committee who feels the need for one urgent last question?

Mr. HAWKINS. Yes, sir.

Chairman OWENS. Mr. Hawkins.

Mr. HAWKINS. May I ask Mr. Turner the same question I asked Mr. Smith? Have you read this report titled "The Segregation of Public Schools, the Third Generation?"

Mr. TURNER. We have not received or seen that, Mr. Chairman. Perhaps you could share it with us after the session.

Mr. HAWKINS. It was financed in part by the Department of Education, and it contains—well, the question I wanted to ask you, I guess, is not relevant. It speaks of increasing segregation of Hispanic students—the most segregated States are in Illinois and New York—two of my friends represent districts in those States, and those school districts—are knowingly denying limited English-proficient students their civil rights.

It would seem to me that the Department of Justice should be interested in those statements and in the well-documented evidence that is presented in this report. Otherwise, it would seem to me, I would suggest that the Department of Justice is a misnomer.

Mr. TURNER. You will be glad to know it is not a misnomer.

Mr. HAWKINS. Well, I would hope so. But if you have not even responded in any way to a document that certainly is available to you, you have copies, I would suggest that you then submit to the committee, when you have had an opportunity to read it, what litigation, if any, has followed the reading of the document and what you intend to do about the statements contained therein.

Mr. TURNER. Mr. Chairman, we are pursuing right now an appeal in a case called San Felipe Del Rio in Texas, involving the bilingual education issue. The Attorney General does not have self-starting authority under Title IV to file lawsuits. We file lawsuits and we conduct investigations when we receive a statutory complaint.

Under the law that Congress passed back in 1964, the Attorney General has to certify that he has received such a complaint and that he is satisfied that it is bona fide before we initiate either an investigation or a lawsuit. To my knowledge, we have not received such a complaint from any citizen in Illinois and New York.

The other way we get involved in these matters is through referrals from Dr. Smith at the Office for Civil Rights, OCR. We have not, to my knowledge, received in either of the States you mentioned such a referral. I do not believe we have anything going in those States.

We are entirely willing and able to conduct such investigations as our action in San Felipe Del Rio shows.

Mr. HAWKINS. I don't have time to follow up, but I would assume the Office for Civil Rights would make referral to the department of its findings. Therefore, it would seem to me that these allegations that are being made that are really atrocious might have some solution through the two departments cooperating with each other.

I won't follow up on this, because I just don't have the time. I would certainly strongly suggest greater cooperation then between the two departments.

Mr. TURNER. We accept your suggestion.

Mr. WILLIAM SMITH. Mr. Hawkins, I wanted to say to you that when I said to you I had not read it, but I had seen it, I did not mean in your hands. I had met with Dr. McWilliams. She had already agreed to send me a copy. She was the principal author. I had read the different generations that she had described.

I just had not read it in toto, so I did not feel I could respond to it. I want you to know I had seen it, I had it in my hands and I had in fact begun to review it. I could not respond to it. We will, if you wish us to do so.

Chairman OWENS. The Chair would like to thank both of the representatives of the Administration, and stress the fact that we would like to submit additional questions to both of you in writing. Mr. Smith, we are particularly interested in your management review and supporting documentation for that review. We would like to submit questions related to that. Although we appreciate your predicament, having been there for a short time, we would like for the answers not to stress the fact that you have only been there for a short time. We want to deal with the institutional memory and institutional record with respect to these events. Thank you very much.

Mr. WILLIAM SMITH. I appreciate that. I did not mean it in that sense with regard to the number of months. We will be sure that we will respond to everything you asked for.

Chairman OWENS. Thank you again.

The Chair would like to note the fact that we are a little behind schedule. We do intend to complete the second panel in its entirety before we break for lunch. The second panel will please come forward at this point.

The second panel includes Phyllis McClure, the Director of the Division of Policy and Information, NAACP Legal Defense and Educational Fund; Elliott Lichtman, Esquire, Lichtman, Trister, Singer & Ross; Dr. Ethel Simon-McWilliams, Northwest Regional Education Laboratory. We are adding to the panel Dr. Gary Orfield from the University of Chicago.

The Chair would like to remind all witnesses that we have your written testimony and they will be submitted for the record. We would like to begin with Ms. McClure.

STATEMENTS OF PHYLLIS McCLURE, DIRECTOR, DIVISION OF POLICY AND INFORMATION, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; ELLIOTT LICHTMAN, ESQ., LICHTMAN, TRISTER, SINGER & ROSS; DR. ETHEL SIMON-McWILLIAMS, DIRECTOR, DESEGREGATION ASSISTANCE CENTER, NORTHWEST REGIONAL EDUCATIONAL LABORATORY; and DR. GARY ORFIELD, UNIVERSITY OF CHICAGO, DIRECTOR, METROPOLITAN OPPORTUNITY PROJECT

Ms. McClure. Thank you, Chairman Owens, Mr. Hawkins, Mr. Smith, Mr. Payne, Mr. Hayes, good morning. On behalf of the NAACP Legal Defense Fund, I want to thank this committee for conducting its oversight responsibilities of the Office for Civil Rights of the Department of Education, the office responsible for assuring non-discrimination on the basis of race, color, national origin, handicap, age, and by recipients of Federal funds from that department.

I want to say that the majority staff report that this committee did approximately a year ago is a very unique kind of oversight report. In my experience, most oversight reports are based on hearings in Washington, official documents issued by the department, sometimes by outside investigators like the GAO, sometimes on the basis of allegations by civil rights groups.

This majority staff report was based on information collected from the employees of the very agency—over half of the regional offices under the Office for Civil Rights.

Let me turn to some of the things that have been raised already by Mr. Smith and his colleagues and by members of the committee who brought up various questions.

Mr. Owens, you began by saying that Mr. Smith's testimony conveyed a sense of urgency. I was wondering urgency to what? I almost felt as if Mr. Smith was polishing up the fire engine, cleaning out the fire house. Where was the fire? I do detect a different tone in Mr. Smith's appearance before this committee and his testimony. He is not drawing up the wagons, he is not being so defensive. He is being somewhat more cooperative, somewhat more open.

But what I also do not find in his testimony and his approach is what are the very issues of discrimination in this country that OCR is prepared to go after when all of its management reviews and one thing or another are finished.

Second, Mr. Smith has said repeatedly throughout his testimony he has blamed the time frames for a lot of things. I have heard the time frames blamed for a lot of things, too, but I never heard them blamed for the attrition of the Office for Civil Rights.

I thought largely since '81 a large part of the attrition was due to the fact that a lot of employees disagreed severely with the civil rights policies of the Reagan Administration. Mr. Lichtman will say more about the time frames than I.

Let me say that these alleged burdensome problems with the time frames are generally of the agency's own making, as the majority staff report points out. They have had, and they continue to have, ample opportunity to come forward and say precisely what is the burden, what can't they live with, what is it they want to propose to do differently.

Let me move on to the fact that the majority staff report noted decline and disproportionately less attention given to title VI compliance reviews and complaints. I note in my written comments why I believe the number of title VI complaints has declined and also why the number of Title VI compliance reviews, that is agency initiated reviews that don't depend upon the receipt of any complaint, has declined. I am glad to hear him say that he is going to increase them. I am curious to know what he means.

There is a critical need, especially in the South, for compliance reviews of pupil segregation. Mr. Hawkins referred to that new report. I want to bring to the committee's attention that the Atlanta Journal, Atlanta Constitution last year did a seven part series "Divided We Stand, The Resegregation of Our Public Schools, a New Wave of Segregation. The Nation's Public School Systems Quietly Abandoning Three Decades of Racial Progress."

This is a critical need in the South and certainly elsewhere. I must say to you that there are problems inherent in Office for Civil Rights that don't give me a great deal of hope that they are going to do school segregation, pupil assignment, or faculty reviews. For one thing, their data base isn't very good in that respect. They are limited to investigating. They would have to refer the cases to the Department of Justice.

The reason is that since the mid-seventies, the Congress of the United States has attached riders to the department's appropriations bill that limits its power to effective remedies for segregated schools. If there were a better working RIP between OCR and the Justice Department, OCR could investigate and refer these matters to the Justice Department. Or alternatively, Congress could remove the riders. It might put the Office for Civil Rights back in the business of using Title VI as a tool to desegregate schools.

Next, let me jump to the issue of Palm Beach, Florida that Mr. Hawkins raised.

First of all, Mr. Smith was not responsible for the fact that one of those two Title VI complaints was more than two years old, but he is responsible for the fact that while he was acting assistant secretary, a policy existed whereby any applicant was literally cleared unless there was an outstanding, incorrect letter of finding, or decision by administrative law judge finding the recipient in violation. As this committee knows, there were exceedingly few violations LOF ever issued by the agency. It is tantamount for approving any applicant.

Furthermore, Mr. Hawkins, the fact of the matter was that the assurances built into the statute that are part of the Hawkins Stafford and School Improvement Act, the assurances say—one of them—that no applicant, or an applicant has to assure that there is nondiscrimination on the basis of race in hiring, promotion, and assignment of faculty. OCR had evidence of its own that there was a pattern of racially assigned faculty in portions of the Palm Beach County school district. That did not raise a question.

It seems to me that race is a question as to whether OCR is exercising its pre-clearance responsibilities in a way that Congress intended. It may be that you are going to have to get more to the bottom of this. This was not an issue that was explored to any extent at all in the majority staff report. That is the only circumstance I know of.

There have been—by the way, Mr. Hawkins, that money just went this year. It was in August when those grant awards were announced. The pre-clearances were done by the regional offices in April. It was forwarded, all of those clearances were to be determined by the regions something like April 20. They went to headquarters. This all happened while Mr. Smith was there, all right.

The next issue I want to talk about is this violation corrected LOF, which both Congressman Payne and Congresswoman Lowey touched upon.

The majority staff report talks about it. Of course, OCR—what I have come to appreciate is that although this violation corrective LOF business was started many years ago, there is great resistance to change, and the regional offices like it. They want to preserve the status quo. I have come to appreciate why that may be so. The fact of the matter is that it is so difficult for the regions to get Washington to go along with it on correcting an LOF. There was such delay in headquarters when cases are sent for clearances to find a recipient in violation—a situation which I call referring these cases to the black hole—that the regions would rather keep that cased, try to extract some compliance from the recipient, and again, by the pressure of the time frames, they feel that they have got to try to settle these cases, and keep them away from Washington.

You know, I can appreciate their rationale for wanting to preserve this system, but I remain convinced that it is still not the proper way to run an enforcement agency. I brought a couple of examples of letters of findings with me to explain exactly why. I won't go into that unless you want to raise it on questions.

Moving right along, however, you notice that Mr. Smith said that OCR got a supplemental appropriation of $790,000. Well, I guess I was glad to hear that. Mr. Smith seems satisfied with his current staffing level. Yet I also note that the Office for Civil Rights has not finished editing the data that it collected from elementary and secondary schools in '88 because—I am told by people in Mr. Smith's own office that they have not—they weren't awarded the money to finish the job of editing. That is last year's survey. They are now going through the clearance process for their '90 survey.

I got a copy of the clearance package. The '90 survey looks exactly like the '88 survey, and the '86 and the '84 and the '82. I mean, it is business as usual with that elementary and secondary survey.

In addition, next time Congress gives them the supplemental, I think they ought to spend some of it expanding their data base. They have no useful compliance indicator information in higher education, in vocational rehabilitation, and they have not done a civil rights compliance survey of vocational schools in five years.

Now, the next issue I want to come to is policy. When I was preparing for my testimony, I read the part of the majority staff report that talked about policy. Then I looked at the 8th annual report. Congress, when it created the department, and created the Office of Assistant Secretary for Civil Rights, also put in a requirement that the assistant secretary file a report with Congress every year.

I sometimes rue the fact that Congress implemented or required that report. Nonetheless, I quote in my written testimony what the majority staff report has to say about policy and what the annual report filed with Congress. By the way, it was filed a couple, about two months after the majority staff report.

The Office for Civil Rights is saying that they have issued about 75 policy and procedural guidance documents for its regional offices. They also talk about policy guidance that has been issued to members of Congress and members of the public. I am curious as to what all those documents are. OCR doesn't tell us either here, or I note in Mr. Smith's testimony, I heard not a single reference to policy. The question of cleaning up the fire house, but where is the fire? What is this urgency going to be directed at is the question I think the committee ought to pursue and I have not heard an answer to this morning.

The policy issues, whether it is the regional office that think they don't have enough guidance on how much fact and how much proof they have to have to make a case, or whether it is Washington saying we have issued policy, I think there is probably some truth in both regards. But when I talk about policy, I mean where is OCR's policy, where is the department's policy on how Title VI applies to homeless children?

How about the situation of immigrant children in this country? Where is the department's policy on choice, on how choice must comply with Title VI and Section 504?

Here is the Administration, the White House and the Secretary arguing for choice, but not a word about civil rights policies implicit in that.

Finally, let me, since I have already covered most of the things I wanted to say, let me turn finally to some recommendations for Congress. I think it is difficult for this committee or indeed the other committee that held oversight hearings on OCR two years back principally be devoted to higher education, which my colleagues on this panel will get into. Both of these committees have had a sense of frustration to get its message across that it wants some change. I heard some of that frustration from you this morning.

I thought I might offer just a couple of suggestions that you might want to consider.

The one thing that gets the agency—any agency's attention instantly, is their budget. The annual budget when OCR comes before the Appropriations Committee, this committee and its staff might consider testifying.

You certainly should present your findings both at this hearing and any other evidence you have as to what you feel is not being done. You might consider, or the Appropriations Committee might consider dealing with certain riders to the department's appropriations bill directed at the Office for Civil Rights.

There are riders now that are prohibiting OCR from undertaking certain remedies. Might the Congress use that to acquire OCR to undertake certain activities?

Second, Congress does have this mechanism of an annual report that is to be filed. If that annual report is not sufficiently forthcoming, the committees, or the Speaker's Office can always write back to the Office and say, "this is not sufficient. We want further details. We want substantive details, not a lot of numbers and charts", and use that annual report as a tool and as a means of trying to extract information.

Although that report has its limitations, I must say it is a valuable tool for public information purposes because in the past several years the Office for Civil Rights has been acting and furnishing as a secret agency, secret society. It has no public relations effort to speak of. It hardly ever puts out a press release.

It requires members of the public and members of the press to deal only with one single individual in Washington. Knowledgeable people in the region, in headquarters, are not allowed to speak publicly on the record. If it were not for the Freedom of Information Act, there would be no way in other than that annual report.

That can be a valuable tool.

Finally, as has already been brought up, the last presidential appointment, I believe, in the Department of Education to be filled by the President is this position of Assistant Secretary for Civil Rights. There are some confirmation hearings coming up in Congress.

It would seem to me perfectly appropriate that members of this committee either testify in person or present information to the Senate Committee on Labor and Public Welfare when those confirmation hearings come up.

Thank you. Of course, I will answer any of your questions.

[The prepared statement of Phyllis McClure follows:]

TESTIMONY
of
PHYLLIS MCCLURE, DIRECTOR

DIVISION OF POLICY AND INFORMATION
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
before the
COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
November 28, 1989

Chairman Hawkins, Members of the Committee. On behalf of the NAACP Legal Defense and Educational Fund, I wish to thank you and the Committee for conducting oversight of the Department of Education's responsibility for enforcing the Nation's civil rights laws in schools and colleges which receive federal financial assistance from the Department.

The Committee's Majority Staff Report (hereinafter referred to as the Report) on the Department of Education's Office for Civil Rights (OCR) is unique. It is based on what OCR's own staff told Committee investigators, not on documents released by officials in OCR Headquarters, not information collected by outside investigators such as the General Accounting Office nor on allegations by civil rights groups. The letter from LeGree Daniels, former Assistant Secretary for Civil Rights, which is printed in the Appendix of the Report is OCR's only response to date. That letter charges the Report with misrepresentations, lack of understanding, distortions and other errors. These accusations are directly at odds with the comments of OCR regional staff on which the Report is based. Employees in over half of the Regional Offices would not have consistently told Majority Staff outright falsehoods. OCR has many civil servants who are committed to their responsibilities to enforce the civil rights laws, but they are rarely asked by Congress about the operational details of their agency.

The findings of the Report comport with LDF's observations and knowledge of OCR's operations since 1981. I would like to review some of its major findings and suggest some reasons for those findings. I then propose to offer recommendations to the Committee as to how it might bring about changes in the agency which would lead to more effective enforcement.

MAJOR FINDINGS OF THE MAJORITY STAFF REPORT

1. The Report documents that OCR's workload is dominated by handicap discrimination and that far less attention is given to race and sex discrimination. This is true of both complaints filed with OCR and agency initiated compliance reviews. Rather than conducting compliance reviews in areas which complaints do not raise, OCR selects issues for investigation fairly proportionate

to the types of complaints it receives. The majority of complaints and compliance reviews involve handicap discrimination, followed by sex discrimination, and the fewest concern race and national origin discrimination. The Report further notes that handicap- and sex-based complaint investigations were most likely to be closed with a finding of "violation corrected" while age and race-based claims were most likely to be concluded with a finding of "no violation." The number of compliance reviews overall has appeared to decline since 1983.

Why is OCR apparently giving disproportionate attention to disability discrimination than to race and sex discrimination? Reflected in the large number of Section 504 complaints is the fact, noted in the Report, that middle-class parents and organizational advocates of handicapped children and adults tend to have more resources and more know-how in combatting discrimination through the administrative complaint process. They spend time documenting their claims, following the investigation and challenging OCR's conclusions. The same phenomenon was apparent in sex discrimination claims after enactment of Title IX and publication of the regulations when the number of complaints surpassed those filed under Title VI.

By contrast, many black people and organizations have given up on OCR. I have personally encountered individuals who believe that it would be pointless to file a Title VI complaint against their school system because OCR would not do anything to correct the violations or because doing so would subject black school officials to retaliation. A substantial number of Title VI complaints concern employment, especially situations in which teacher and administrative vacancies are repeatedly filled by whites resulting in a declining black workforce in school systems. Title VI, however, covers employment only where it is the primary objective of the federal assistance or where employment practices subject black students to discrimination. Elements of proof in such cases can be difficult, and since OCR requires no record-keeping of the recruitment or selection process, there is frequently no evidence to sustain a finding of a violation.

There are four reasons why OCR does few agency-initiated investigations under Title VI. The first is that there is an attitude on the part of some managers that Title VI has dealt with overt and readily provable forms of race discrimination, such as intentionally racially segregated schools, and that enforcement of Title VI improperly interferes with decisions made by local school officials in the best interests of children. This attitude is most prevalent in the area of within-school discrimination, such as ability grouping and assignment to classes for the educable mentally retarded.

Second, as the Report notes, some issues such as racially disproportionate discipline and school segregation, are not approved by Headquarters. The Executive Branch has shown no interest in the last eight years in remedying increasing racial segregation of schools. Indeed, it has been more interested in allowing school systems to undo desegregation plans and to return to racially segregated neighborhood schools. But the Congress is also responsible for eliminating compliance reviews of school segregation. Since the mid-1970's riders have been attached to the appropriations bills of the Department of Health, Education and Welfare and the Department of Education which have prohibited OCR from requiring transportation and other remedies for segregated schools. Although OCR is not prohibited from conducting investigations in this area and referring violations to the Department of Justice, why spend agency resources on cases that will go nowhere.

The third reason for the low number of Title VI reviews is that OCR has failed to develop policies which would apply the legal principles embedded in the law and regulations to emerging issues and contemporary developments. Examples here would include treatment of homeless, immigrant or non-resident alien children who are predominantly non-white or unequal access in inner-city and majority black rural schools to curriculum mandated for a high school diploma or college admission.

Lack of data is the fourth reason to explain the paucity of compliance reviews in the area of race. As documented in the Report, OCR's Elementary and Secondary School Civil Rights Survey is outmoded, obsolete and not timely delivered to the Regional Offices for the intended purpose of selecting compliance review sites. OCR has submitted to the appropriate Department officials the Office of Management and Budget Clearance Package of the 1990 Elementary and Secondary School Civil Rights Survey, but it has not completed editing the data from the last survey done in 1988, allegedly for lack of money. The agency collects no useful data in higher education or in vocational rehabilitation that would reveal potential compliance problems. It has not conducted a survey of vocational schools and institutions in five years.

Without relevant policies and good information, with the attitude that Title VI has somehow taken care of the problems which it was meant to correct, and in the absence of political leadership and support for remedying racial discrimination, it is no wonder that so little of OCR's work is devoted to identifying and remedying racial discrimination.

As to the higher incidence of violation findings in Section 504 cases, I think that OCR finds these cases easier to prove. If, for example, a university has a policy of providing sign-language interpreters only to those hearing-impaired students who cannot afford to hire their own, that is a flat-out violation of the regulations. OCR has required the institution to change its policy. Race discrimination is often not as blatant, and investigators lack the training and the time that it frequently takes to build a case.

There are several explanations for the decline in the number of compliance reviews: the number of complaints may have dropped; investigators may have been assigned to monitor state higher education desegregation plans or the Methods of Administration of a state vocational education agency; and the decline in agency personnel.

2. The practice of issuing a violation-corrected Letter of Finding (LOF) was instituted by former Assistant Secretary for Civil Rights Harry Singleton. Prior to his time, if an OCR investigation uncovered one or more violations of the civil rights statutes, the agency issued to the recipient (and complainant if the investigation was conducted pursuant to a complaint) a LOF detailing the facts and applicable regulations in support of its conclusion with respect to each of the violations. The recipient was asked to produce a corrective action plan which would remedy the violation(s).

The Majority Staff Report discusses what is wrong with the violation corrected LOF and why it should be abandoned. Negotiating and securing the promise of remedial action before conclusions of law and fact are formally issued undercuts OCR's credibility to enforce the law, requires far more monitoring to determine whether the promised remedy has been implemented, and if the recipient defaults on the corrective action, necessitates a repeat investigation, repeat negotiations, and a second (and sometimes third) violation-corrected LOF. With recalcitrant recipients, OCR has to reestablish its case and issue a LOF setting forth the violation (assuming no political or ideological objection in Washington) before proceeding to the next enforcement step, a Notice of Opportunity for Hearing.

There is another reason that LDF has long opposed the violation-corrected LOF. It creates a situation in which rights are compromised. In conjunction with the pressure created by OCR's interpretation of the timeframes, the pre-LOF negotiations force OCR staff to accept only as much remedy as the recipient is willing to undertake. In other words, OCR has to accept a bottom-line offer and in the process bargain away some students' rights.

I am firmly convinced that the original reason for changing agency practice was that the Department and the Administration did not want to find recipients in violation of the civil rights laws. If there was a "problem" (a euphemism for a violation), it was to be worked out and recipients' "good faith" intentions were to be honored.

However, the violation-corrected LOF is now entrenched agency policy, and there is terrific resistance to returning to the former practice. The resistance is, in a way, understandable. The Regional Offices want to avoid at all costs sending cases to Washington for clearance to issue a LOF finding a violation because they know that either the case will disappear into a "black hole" for months and years or Headquarters will quibble and question the regions' findings and conclusions of law, forcing regional staff to gather more facts or re-draft the LOF. This process can go on interminably and is exacerbated by the lack of definitive, widely understood and accepted agency policy on how much and what kind of proof is necessary to sustain a finding that the law has been violated.

I have come to appreciate that OCR regional staff have a vested interest in maintaining the status quo. They prefer to keep the case away from Headquarters and attempt to secure some remedial action from recipients rather than see the case get axed in Washington. The timeframes which are missed while the case is sitting in Washington are held against the region and reflect adversely on managers' performance ratings. It is a perverse situation, but in an Administration bent on not enforcing (and even disagreeing with) the law, the rationale of regional officials is at least understandable.

3. The Timeframes

Originally instituted as a result of the Adams litigation, the timeframes were intended to prevent inordinate delays in acknowledging complaints, investigating and resolving cases and taking formal enforcement action. They are a subject of much controversy and complaint within OCR. The controversy and complaints about the burden of the timeframes are of the agency's own making.

As the Report points out, OCR has manipulated the timeframes in such a way as to increase its own burden. It has chosen to collapse the 195 days for the negotiation and issuance of the LOF into 105 days. Adherence to the timeframes has been required of the regions but not of Headquarters. These management decisions have led to the narrowing of issues to fit the available time and by pressuring people to withdraw their complaints. Further, the agency has refused to use the escape valves built into the timeframes orders which allow for more time on complex and multi-issue investigations.

To the extent that OCR has legitimate problems with the timeframes and is not advancing complaints about burden as a cover for its own inefficiency and mismanagement, it has yet to come forward with an explanation of what the burdens are and how the timeframes could be adjusted to ameliorate those problems.

4. Policy Development and Dissemination

There are diametrically opposing views between OCR regional staff, as reflected in the Majority Staff Report and OCR Headquarters as to whether the agency has developed compliance policies to guide its staff or publicly disseminated interpretations of how the civil rights statutes apply to particular issues.

It is interesting to compare the Report with OCR's Eighth Annual Report for Fiscal Year 1988 submitted to Congress on March 23, 1989, pursuant to section 203 (b) (1) of the Department of Education Organization Act on this point. Let me quote first from the Majority Staff Report:

> Exacerbating the problem of the lack of meaningful guidance and support from the National Office during the Reagan years is the apparent dearth of written substantive enforcement policies issued by headquarters. Field staff noted that much of OCR's policies and substantive legal issues in recent years were generated in the form of responses to draft LOFs sent from the regional offices, "marginal notes" on the LOFs returned to the field or in the form of telephone calls from the National office. Rarely would there be policy directives which would be disseminated nationwide and made applicable to all regions. ...The absence of public notice of policy decisions may have also adversely affected recipients, civil rights advocates and others who have an interest in ascertaining the agency's policies regarding various legal and

enforcement-related issues.[1]

The Eighth Annual Report portrays a totally different view.

> During FY 1988, OCR developed and reviewed a substantial number of policy and legal documents related to OCR compliance and enforcement activities. These included approximately 85 policy and procedural guidance documents for its regional offices to assist in interpreting the statutes and regulations over which OCR has jurisdiction. OCR also reviewed approximately 5 court decisions, and 132 Departmental regulations or regulatory changes for their impact on OCR and prepared analyses and comments, as appropriate.
>
> Major policy documents included guidance on jurisdiction under the CRRA and guidance on a variety of issues arising out of regional complaint and compliance review investigations. Other areas of policy guidance included substantive responses to Congress and the general public on policy issues; review of TA and training materials issued by headquarters and the regions; review and approval of states' MOAs; and review and approval of MOUs between OCR and appropriate entities.[2]

As a consequence of my own monitoring of OCR, I conclude that there is some validity to both points of view. I know, for example, that Headquarters did issue policy guidance to the regions revoking the previous intent standard and instituting an effects test for the clearance of applicants for Magnet Schools Assistance grants.

I also know that the absence of legally sufficient guidance on elements of proof and disagreements over the applicability of judicial holdings causes protracted disputes between Headquarters and the Regional Offices and is perhaps the chief reason that draft violation-LOFs are held up in Washington for so long. In addition the multiple levels of review of investigative findings noted in the Report provide substantial opportunity for ad hoc policy making which reflect individuals' predilections rather than agency policy.

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[1] Committee on Education and Labor, A Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights U.S. Department of Education, pp.32-33, January 1989.

[2] Office for Civil Rights Eighth Annual Report FY 1988, p. 55.

The policy problems run deeper. OCR is not developing and issuing civil rights compliance policy on contemporary issues. For example, the Secretary of Education and the White House are promoting parental choice of schools as a remedy for educational failure, but OCR has not taken any cognizance of the how choice plans may violate Title VI and Section 504. Guidance is urgently needed, but in this instance, as in so many other cases, OCR Headquarters is afraid of taking the initiative because staff fear the reaction from "across the street." "Across the street" is OCR parlance for the Secretary's Office or the General Counsel's Office.

As to the 85 policy and procedural guidance documents and policy provided to Members of Congress and issued to the general public which are mentioned in the quote from the OCR annual report, I frankly do not know what is being referred to. Perhaps this Committee could ask OCR to supply copies of the 85 policy documents or require OCR to publish them.

PRE-CLEARANCE OF APPLICANTS FOR THE MAGNET SCHOOLS ASSISTANCE PROGRAM

One important function of OCR which the Majority Staff Report does not explore is its task of certifying that school districts which apply for Magnet Schools Assistance Program (MSAP) funds have met the statutory non-discrimination assurances and that the districts' magnet schools are part of a desegregation plan approved by a court, a state agency or OCR itself or that the magnet schools will reduce minority isolation. Because MSAP reviews are done prior to, rather than after, the grant award, they afford OCR great leverage in remedying any discrimination which may already have been established or which may be uncovered in the pre-grant review process.

The non-discrimination assurances which applicants must satisfy originally applied only to race when MSAP was first enacted in 1984. When the program was reauthorized in 1988 as Title III of the Hawkins-Stafford School Improvement Act, the non-discrimination assurances were expanded to include discrimination on the basis of sex and disability.

The three assurances are require that the local educational agency will not engage in discrimination based on race, religion, color, national origin, sex or handicap

- in the hiring, promotion or assignment of employees,
- in the mandatory assignment of students to schools or courses of instruction within schools, and
- in designing or operating extracurricular activities

for students.

Three matters must be brought to the Committee's attention:

First, the Department has never issued any regulations pertaining to OCR's pre-clearance responsibilities.

Second, the Regional Offices have not been given time to examine applicants for compliance with the non-discrimination assurances.

Third, in the latest round of MSAP grants, the Policy and Enforcement Service of OCR has given applicants civil rights clearances regardless of any evidence collected by the Regional Offices unless there is an outstanding, uncorrected violation LOF. Because, as this committee knows, there are exceedingly few violation-LOFs ever issued, that policy is tantamount to clearing all applicants and is further, I believe, a violation of Congressional intent.

The first-line investigation of MSAP applicants is done in the Regional Offices, but they were given only 20 days to complete their work. One major problem is that the applications do not contain information which is relevant to OCR's compliance determinations. Not until the Regional Offices know who the applicants are can they begin to acquire the information they need to determine if school systems are meeting the assurances. There is a lot of data which must be gathered and analyzed in 20 days. Due to the short time period, data gathering and investigations had to be terminated prematurely in order to meet the deadline set by Washington. Yet Headquarters allowed itself twice as long to review the regions' work. Under these circumstances, it is impossible to ascertain whether or not the MSAP applicants are complying with the non-discrimination assurances.

Even if regional staff had sufficient time and had produced evidence that the district was not meeting its assurances, OCR Headquarters has ignored it and cleared the applicant district. This is precisely what happened in the case of Palm Beach County, Florida. That school district received a $3.4 million magnet school grant despite evidence known to OCR that 41 of the districts' 107 schools were racially identifiable and that in over half of these racially identifiable schools there was a pattern of racial assignment of faculty.

Furthermore, The Atlanta Regional Office had received two Title VI complaints, one of which was more than two years old. Both complaints alleged that the Palm Beach County school officials had allowed three schools to become 75% and more black in a part of the district which was approximately 20% black. The Atlanta Regional Office found a violation of Title VI in both cases, but Headquarters did not agree with this conclusion and did not approve issuing a violation LOF. Now that Palm Beach County school system has its $3.4 million, the Regional Office has been instructed to "settle" the complaints.

Let me conclude by briefly suggesting action that this Committee, which has principal oversight responsibility, might consider taking. Both the hearings conducted by Congressman Weiss and this Committee's Majority Staff Report have been ignored by OCR and by Secretaries Bennett and Cavazos.

The one thing which is guaranteed to get the agency's attention is its annual budget. This Committee should convey its findings to the appropriate subcommittee of the Committee on Appropriations, and Members could testify. The Appropriations Committee might consider attaching riders to the Department of Education's budget requiring OCR to change its practices.

Under the Department of Education Organization Act, the Assistant Secretary is required to file an annual report with Congress which summarizes the compliance and enforcement activities of OCR and identifies significant civil rights compliance problems. This annual report presents what I call "the official truth." It is full of a lot of numbers, charts and descriptions of agency activities, but it tells very little about what kinds of compliance problems have been found and what remedies have been obtained. It does not reveal substantive policy or any data which might be obtained from surveys about enrollments, employees, and services regarding minorities, the disabled or women. Either this Committee or the Government Operations Committee could review these annual reports, request further information, and require specific kinds of information in future annual reports.

I must digress here to say that these annual reports, despite their limitations, are a vital source of public information. In the past decade, OCR has functioned almost as a secret agency. It has no public relations function to speak of. It hardly ever issues any press releases. It does not even announce its own "victories" or successful resolution of major compliance actions. Agency policy prohibits knowledgeable regional and Headquarters staff from speaking to the press. Only the Freedom of Information Act provides a window on OCR's operations, but one has to know exactly what documents exist in order to make a FOIA request.

Finally, this Committee could provide its oversight findings and recommendations to the Senate Committee on Labor and Public Welfare when confirmation hearings are held for the President's nomination of an Assistant Secretary for Civil Rights.

Thank you for the time and attention which the Committee has given to critical issues which have prevented effective enforcement of the civil rights laws by the Department of Education.

Chairman **Owens**. Thank you.

Mr. Lichtman.

Mr. **Lichtman**. Thank you. I have submitted a prepared statement for the record. I will attempt only to summarize briefly its highlights at this time.

Then I will try to respond to the criticism of the Adams' time frames which has been a subject which seemed to consume the testimony of Mr. Smith.

I am counsel for the plaintiffs in the *Adams* v. *Cavazos* case, a case which has long attempted to induce the Office for Civil Rights of the Department of Education to enforce Title VI of the Civil Rights Act of 1964. Throughout this two decade litigation we have with regularity been forced to return to the Federal court for more and more judicial relief. In almost every case the court's order has been filed initially with some enforcement activity only to result in a slackening of effort, forcing us to return once again for further judicial help.

We have now reached a point where it is unclear whether further court intervention will be forthcoming. After 16 years of active litigation with major orders issued every few years, the District Court in 1989 dismissed the case at the behest of the Government on the ground that plaintiffs lack standing to pursue their claims against the Federal defendants relying upon a recent Supreme Court decision.

On appeal, the U.S. Court of Appeals in July of this year reversed the District Court, holding that plaintiffs do have standing because they have been injured and are being injured by the continuing distribution of Federal funds to the schools and colleges which they attend and which are discriminating against them on the basis of race.

And that the injuries suffered is fairly traceable to the Federal defendants who are subsidizing that racial discrimination. However, before permitting the case to proceed, the Court of Appeals sat down for further briefing and argument a series of legal questions such as whether the plaintiffs have a cause of action at all against the Federal defendants under Title VI, Title IX and A04, and whether the Federal defendants are bound by consent decrees entered into by their predecessor Federal officials in prior administrations.

Of course, even if we prevail on those issues, the Government may seek certiorari from the Supreme Court under the standing separation of powers and other legal issues being raised. At this point, with respect, future assistance of the Federal court in Adams is in question, OCR has taken a series of drastic actions tantamount, in our view, to an administrative repeal of Title VI.

The Agency's misconduct is most dramatically shown in the case of the statewide desegregation efforts in higher education affecting a substantial number of southern and border States, a subject on which Mr. Smith did not comment one bit, at least as far as I could tell.

As long ago as 1969 and 1970, OCR concluded that each of the States was operating a system of higher education in which the vestiges of the former dual systems remained. Since the filing of the Adams case in 1970, there have been no less than three cycles of desegregation plans involving this higher education system.

Each provided a formulation of the plan by the State, approval of the plan by OCR, purported implementation by the State and a finding that the State had not met its commitments. The only difference in the current cycle is in its conclusion.

That is that OCR has now decided that the States have come fully into compliance with Title VI. Some negotiations are continuing with two States, but all the signals indicate that a compliance finding will soon occur there as well.

More specifically, at the direction of the court, OCR issued in 1977 a series of desegregation criteria by which the statewide desegregation plans were to be measured. There followed the submission of plans approved by OCR which attempted to achieve the objectives required by those desegregation criteria.

When those goals were generally unmet in the early nineties, the District Court in the Adams case required OCR to secure further commitments from the States, commitments of additional measures which could realistically achieve the objectives of those plans by the end of the latest five year cycle.

That is the 1985 and 1986 school year. However, when the results were scrutinized, we found once again that the States had failed to reach most of the desegregation goals set forth in their plans and in the formal desegregation criteria.

Nevertheless, despite those conclusions, despite those findings, this time OCR and the Secretary of Education have found Title VI compliance simply because the States often carried out the steps or measures which they promised notwithstanding the sad fact that the measures have not removed the vestiges of segregation.

The other committee that has looked at this issue, the House Committee on Government Operations, concluded—and I will quote one paragraph from their report a year or two ago. This is the House Committee on Government Operations report issued in 1987. They found, "The Subcommittee reviewed the history of the expired desegregation plans, including the original findings of violation of Title VI, the OCR regional summaries of each expired plan and the OCR staff's site visits of every institution covered by the plan. Based on this review, the Committee concludes that the original violations of law have not been corrected, and the factors that OCR found that constitute illegal vestiges of segregated systems of higher education remain."

In short, the vestiges remain. OCR has almost completely closed the book with its findings of compliance and no help can be expected from the Adams case in the near future.

There remains, of course, the Congress which enacted the law which OCR has egregiously flaunted. We appeal to the Congress to exercise its oversight and appropriations authority to bring about a vindication of statutory rights of plaintiffs and others attending the racially discriminating schools with the assistance of Federal funds.

Let me add just a word about the time frames that were referred to me by Mr. Smith on a regular basis throughout his testimony. It seems they seem to have become an excuse for the lack of enforcement generally. Let me make a number of comments. Number one, there are longer time frames in the Adams order for more complex cases. They are not all the same for every kind of case.

Number two, these time frames were agreed to by two prior Administrations and resulted in consent decrees, a Republican Administration, the Ford Administration, and a Democratic Administration, the Carter Administration. These time frames have been modified over the years by the court as experience has warranted.

The government has really only made one serious effort to modify those time frames. That resulted in a hearing before District Judge Pratt in March of 1982 in which for three days the Judge heard testimony about these time frames. The government was really attempting to get out from under any time frames altogether, not saying they are too long but they don't want any at all.

The court's conclusion after hearing three days of testimony was there must be some time rules of some kind. Given the history of this case, given the history of OCR's enforcement and go back to 1970 when this case was filed, this has been a classic agency which has promulgated and carried out the principle of justice delayed equals justice denied.

That has been the origin of the time frames. The judge decided, you can't continue to delay forever because that has the effect of denying people rights.

There has to be some time frames. That is what he ordered. There is nothing magic about the time frames we have in the order.

They can be modified. What the Government wants is no time frames at all. It is very confusing because there are no time frame orders mandating anything at this point in time. The Adams case has been temporarily dismissed.

The judge in December of 1987 dismissed the order, dismissed the case. The time frames don't exist in terms of a judicial mandate.

We have got a partial reversal in the Court of Appeals. Hopefully, we will have a complete reversal and have time frames put into place. Even if we are successful on appeal, there is nothing to stop the Government from saying we have specific experience with certain kinds of cases and we request different time rules for different kinds of cases.

The judge modified those rules in the past and chances are he will modify them in the future if the Government can make that showing. The Government has never done so. The ILL behooves them to come before this committee and use the time frames as an excuse for their failure to enforce a statute at all. It is misleading and highly inappropriate for the agency to come to this Congress and ask that the time rules—use the time rules as an excuse for their general non-enforcement. More, I guess, if they have a problem with the times rules, when the order goes back into effect, they ought to go to the judge with evidence and show him how those time rules ought to be modified and chances are they will be.

That completes my initial presentation. I will be happy to answer any questions after other panelists have had an opportunity to speak.

[The prepared statement of Elliott Lichtman follows:]

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TESTIMONY OF ELLIOTT C. LICHTMAN BEFORE HOUSE COMMITTEE ON EDUCATION AND LABOR ON NOVEMBER 28, 1989

Chairman Hawkins and Members of the Committee:

I appreciate the opportunity to provide testimony concerning the case of Adams v. Cavazos and the enforcement activities of the Office for Civil Rights of the Department of Education ("OCR"). For the record, my law firm along with the NAACP Legal Defense Fund represent the plaintiffs in the Adams case.

In this written statement, I will (1) briefly review the history of the Adams case filed in 1970 including the continuing need for this litigation, the evolving orders of the federal court and the temporary dismissal of the case in 1987; (2) the recent unravelling of OCR's desegregation effort; and (3) the partial success of the appeal in Adams and the need for rigorous oversight by the Congress.

The original complaint in Adams was filed in the United States District Court for the District of Columbia in October 1970. It charged that the defendant Secretary of the Department of Health, Education and Welfare (now Department of Education) and the defendant Director of the Office for Civil Rights were violating Title VI, the Fifth Amendment, and the Fourteenth Amendment "through continued assistance to public schools and colleges" in 17 southern and border states that were engaging in racial segregation and discrimination in education.* Individual class representatives include students who attend historically black public colleges that have yet to receive equal treatment, black students who continue to suffer discrimination at historically white public colleges, and other black students who attend elementary and secondary schools that practice racial discrimination but continue to receive federal funding.

Plaintiffs alleged that defendants were systemically defaulting on their statutory duty under Title VI by failing to initiate investigations, by delaying investigations in progress, and by failing to initiate fund termination proceedings against schools found to be practicing discrimination, including those schools and school systems that had reneged on their commitments under negotiated desegregation plans.

Describing in detail HEW's broad-scale failure to comply with Title VI's mandatory requirement, the district court held that the agency was under an affirmative duty to commence enforcement proceedings when efforts toward voluntary compliance failed. Adams v. Richardson, 351 F. Supp 636, 641 (D.D.C. 1972).* The district court directed HEW's Office for Civil Rights to commence enforcement proceedings within specific time limits in pending cases and to report to the court on any failures to meet judicially specified timeframes in processing future cases. Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973).

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* A separate class action, Brown v. Weinberger, 417 F. Supp. 1215 (D.D.C. 1976), arose from a similar complaint filed with respect to 33 northern and western states. Pursuant to a settlement agreement in 1977, that case was largely consolidated with Adams.

In 1973, the United States Court of Appeals for the District of Columbia, sitting en banc, unanimously affirmed. Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973). The Court held that "affirmatively continu[ing] to channel federal funds to defaulting schools" is unlawful. It mandated that if the agency could not obtain voluntary compliance "within a reasonable time," it must enforce Title VI by starting fund termination proceedings (or by referring the case to the Department of Justice), and stated that "consistent failure to do so is a dereliction of duty reviewable in the courts." Id. at 1162-63.

The Adams Court Mandates Timeframes To Counter Delays In Processing Complaints and Conducting Compliance Reviews

Despite the unanimous affirmance by the Court of Appeals in 1973, plaintiffs found it necessary to seek further judicial relief in the face of continuing default by OCR. The court found that

> having failed during a substantial period of time to achieve voluntary compliance [for some 39 school dis-

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*The District court in Brown v. Weinberger also made detailed findings of HEW's record of noncompliance and in reliance of those findings concluded that HEW had failed to fulfill its statutory duties under Title VI. 417 F. Supp. at 1219.

> tricts], [HEW] has not commenced enforcement proceedings by administrative notice of hearing or any other means authorized by law. Apart from the school districts expressly covered by this Court's February 16, 1973 order, HEW has not initiated a single administrative enforcement proceeding against a southern school district since the issuance of this Court's Order 25 months ago.

Adams v. Weinberger, 391 F.Supp. 269, 273 ((D.D.C. 1975). Finding "over-reliance" by OCR on negotiations "over protracted time periods," the district court granted supplemental relief including timeframes for future Title VI enforcement activities. *Id*. at 271. The government did not appeal this order. A year later in 1976, pursuant to a consent agreement entered by the Ford Administation, the district court extended the timeframes order with modifications to reflect experience in implementing it.

In 1977 plaintiffs filed a motion for further relief alleging that defendants still had not corrected their chronic delay in complying with Title VI. Upon completion of an evidentiary hearing, the parties engaged in protracted negotiations which resulted in entry of a Consent Decree on December 29, 1977 that modified the 1976 order.

Following this series of orders, the large backlog of unresolved complaints was significantly reduced. By 1980 and 1981, however, OCR again regressed, incurring massive delays in all stages of complaint processing and compliance reviews. Plaintiffs then filed a motion requiring defendants to show cause why they should not be held in contempt of court. After taking evidence from both sides in a 1982 hearing. the court concluded that the December 1977 Decree "has been violated in many important respects" (Hearing, March 15, 1982, Tr. at 3, emphasis added). The court also found that if the government were "left to its own devices, . . . the substance of compliance will eventually go out the window." In August of that same year, after negotiations proved fruitless, defendants moved to vacate the 1977 Consent Decree in its entirety. The district court denied that motion on March 11, 1983, finding that defendants had not made the requisite showing of "grievous wrong evoked by new and unforeseen conditions;" nor had defendants shown that the purposes of the litigation had been accomplished. That same day the district court issued a second order reaffirming but "modify[ing] the terms of the 1977 Consent Order."

After entry of this 1983 Timeframes Order, OCR delays again decreased. In sharp contrast to its practice in earlier years, OCR commenced, within about a year, administrative enforcement proceedings against 23 recalcitrant school districts and referred another 18 districts to the Department of Justice for civil suit. More recently, however, enforcement activity sharply declined once again; only nine districts were noticed for hearing in fiscal 1986. Although we believe OCR's enforcement activity regarding elementary and secondary school districts has continued to decline in the last three years, we are unable to provide precise data since OCR ceased its reporting to plaintiffs following the district court's 1987 dismissal of the Adams case discussed below.

The Court Mandates the Desegregation of Higher Education Institutions

In 1969 and 1970 OCR found that ten states were operating segregated systems of higher education in violation of Title VI. Despite the agency's own findings, however, it took no effective action to require desegregation or to stop federal funding until required to do so by court orders in the Adams case.

Following the 1973 Orders of the district court and the Court of Appeals, OCR in 1974 obtained desegregation plans from eight states. By the following year, however, the agency found widespread default in state performance of the plan commitments and reiterated the finding that the states were not in compliance with Title VI; but nonetheless OCR took no enforcement action. Plaintiffs then moved for further relief. After reviewing substantial documentary evidence and holding oral argument, the district court concluded that defendants had failed to enforce Title VI and that the 1974 plans were inadequate under defendants' own requirements. Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977). Under the court's Order, OCR first developed and adopted criteria to guide formulation of new higher education desegregation plans, and then in 1978 obtained significantly improved five-year plans.

Before the plans expired in 1982-83, OCR concluded that the states were in default and "virtually certain" not to achieve desegregation. Nonetheless, OCR still refused to initiate enforcement proceedings. Plaintiffs again sought relief, and on March 24, 1983, the district court found that

> [e]ach of these states has defaulted in major respects on its plan commitments and on the desegregation requirements of the Criteria and Title VI. Each state has not achieved the principal objectives in its plan because of the state's failure to implement concrete and specific measures to ensure that the promised desegregation goals would be achieved by the end of the five year desegregation period. Adams v. Bell, Order at 2.

The court directed OCR to require full desegregation or commence proceedings to terminate federal funding.

During the implementation of desegregation plans prompted by the district court's order, there was some -- albeit little-- progress. For example, traditionally black institutions (TBIs) were strengthened with construction, renovation, and upgraded programs, though not nearly to the point of comparability with their white counterparts. However, as we discuss below, when the plans expired in 1985 and 1986, the states had defaulted on many of their desegregation plan commitments to desegregation and equalization.

Government Appeal, Remand, Dismissal

OCR appealed the "timeframe" orders entered on March 11, 1983, which had refused to vacate the 1977 Consent Order and reaffirmed the time rules. Defendants did not appeal the March 24, 1983 higher education Order. In 1984 the Court of Appeals, without reaching the merits, remanded for consideration of plaintiffs' standing to continue the case in light of the Supreme

Court decision in Allen v. Wright, 468 U.S. 737 (1984). Women's Equity Action League v. Bell, 743 F.2d 42 (1984).

Following the remand proceedings, the district court on December 11, 1987 dismissed the case in its entirety. Adams v. Bennett, 675 F. Supp. 668. The court found that plaintiffs lacked standing in the case and further that the March 1983 orders violated the separation of powers doctrine. Plaintiffs promptly appealed to the United States Court of Appeals for the District of Columbia Circuit. During the pendency of the remand proceedings on the standing issue and during the appeal, a series of actions by OCR largely undermined many of the modest gains previously secured.

OCR's Unravelling of Desegregation

As discussed above, OCR concluded about 20 years ago that a number of states were operating higher education systems that were racially segregated in violation of Title VI. Under the prod of the district court orders in Adams, OCR obtained desegregation plans that were supposed to contain "concrete and specific measures that reasonably ensure that all the goals" of the 1978 desegregation plans would be met "no later than the fall of 1985." (March 24, 1983 Order, p. 3).

After ten state plans expired in 1985 and 1986, the House Committee on Government Operations, reviewing OCR's own reports on the progress of the states, concluded:

> The subcommittee reviewed the history of the expired desegregation plans -- including the original findings of violation of Title VI -- the OCR regional summaries of each expired plan, and the OCR staff site visits of every institution covered by the plans. Based on this review, the committee concludes that the original violations of law have not been corrected, and the factors that OCR found to constitute illegal vestiges of segregated systems of higher education remain.*

Plaintiffs' review of the plans and OCR's evaluations and status reports found that the states had not only failed to achieve the overwhelming majority of their goals, but had also defaulted on many promised measures. For example, by OCR's own description, traditionally black institutions (TBIs), such as Virginia State University (attended by several of the Adams plaintiffs), had not been made comparable to their white counterparts in facilities, resources and programs, and a number of plan measures for enhancing them had not been implemented. Similarly, as the gap between black and white college-going rates widened, states disregarded measures they had promised for the purpose of narrowing it.

The NAACP Legal Defense Fund has reviewed in detail the major defaults of the states on the commitments set forth in their desegregation plans. Although space does not permit a summary of the numerous LDF findings shared with OCR, it does permit a review of some of the key findings regarding one illustrative state,

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*Failure and Fraud in Civil Rights Enforcement By The Department of Education, House Committee on Government Operations, H. Rep. No. 100-334, 100th Cong., 1st Sess. 8 (1987).

Arkansas. This example demonstrates the Secretary's abandonment of the important requirement in the state plans of comparability between traditionally black institutions (TBIs) and traditionally white institutions (TWIs) with similar missions. Arkansas promised new programs to the University of Arkansas-Pine Bluff (UAPB), its TBI, including an autonomous master's degree program, and elimination of unnecessary program duplication with the TWIs. OCR's 1983 Status Report (p. 5) found that the state had not established the master's program, citing lack of funds; that no new programs had been added since 1982; and that unnecessary program duplication remained. The agency told Arkansas to "expand UAPB's program offerings and take steps to reduce duplicative program at TWIs that share UAPB's service area." Id. Subsequent OCR reports made clear that the state did not comply with this directive. (Compare OCR 1983 Status Report for Arkansas with OCR 1988 Final Report for Arkansas).

The OCR Task Force which reviewed the state's compliance with Title VI after their plans expired noted with respect to Arkansas, "All projects for construction or renovation of facilities at TBI have been funded or completed, but the TBI continues to have a higher proportion of its facilities rated below average than all but one of the TWIs." (H. Rep. 100-334, supra at 28).

OCR complained to Arkansas in 1983 that the State had not made sufficient efforts "to ensure that effective and comprehensive action will be taken to eliminate the disparities" between black and white college-going rates. Status Report 1983, p. 6. Arkansas' principal statewide "measure" to effectuate this goal was a recruitment program that the state admits was not targeted at blacks in particular. See Addendum, Aug. 31, 1983, p.1. The OCR Task Force Notes on Arkansas reveal that even with the state's efforts after 1983, not all the TWIs implemented recruitment measures called for in the plan. And as evidenced by the OCR 1988 Final Report, the state did not implement a statewide recruitment measure targeted at blacks. Thus when Arkansas' plan expired in 1985, disparities in college-going rates between blacks and whites in Arkansas actually had increased since inception of the plan. (OCR 1988 Final Report for Arkansas.)

These kinds of defaults and many others are replicated in every other "Adams state" plaintiffs have examined. The House Committee on Government Operations reached the same dismal conclusion (H. Rep. 100-334, supra, pp. 10-29). Many of the defaults are simply a matter of money the states refuse to spend for financial aid, for programs to compensate for inferior secondary school education, and for equalization of TBIs.

Despite these widespread defaults on the goals and objectives of the states' desegregations plans, the Secretary of Education and OCR have chosen to ignore the states' failures. Emboldened by the district court's dismissal of the Adams case in December 1987, the Secretary in February 1988 effectively excused all ten states from further equalization and desegregation requirements. Four states were excused immediately. Six were asked to complete minor measures by December 1988 with the promise that no more would be required for a finding of complete Title VI compliance.*

Since OCR has now found most of the states fully in compliance with Title VI despite their egregious defaults on most of their plan goals, the Secretary has plainly shifted the standard of compliance from the achievement of desegregation to the mere carrying out of measures -- regardless of whether the measures actually achieved desegregation. It sadly appears that this shift, which effectively constitutes OCR's abandonment of two decades of desegregation efforts, will apparently only be reversed by directives from the courts or the Congress. Some hope arises from the recent decision by the Court of Appeals in Adams.

Plaintiffs' Appeal in Adams and the Role of Congress

On July 7, 1989, the Court of Appeals ruled on the appeal from the district court's dismissal of the Adams case two years earlier. Reversing the district court, the Court of Appeals held that the Adams plaintiffs are injured by the Department's distribution of federal funds to schools and colleges which discriminate, and that the injury to the plaintiffs is fairly traceable to the federal funding by defendants. Plaintiffs were held to have standing to challenge the actions of the federal defendants and, further, that separation of power principles do not preclude continuation of the Adams case. Before reinstating the 1983 orders in Adams and permitting plaintiffs to return to the district court for further relief, however, the Court of Appeals set for further briefing and oral argument four legal issues: (1) whether Title VI, Title IX and Section 504 authorize an action directly against the federal funding/compliance-monitoring agency; (2) whether the district court has authority to impose procedural or enforcement requirements such as timeframes and reporting; (3) whether the current government official defendants are bound by the consent decrees negotiated by the government official defendants of prior administrations; and if so, what must be shown to set aside or modify the consent decrees; and (4) whether the states which submitted higher education desegregation plans to OCR are "indispensable" parties to the federal litigation. The argument has been scheduled for May 15, 1990.

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*All but two of the states, Virginia and Florida, have now satisfied the Secretary and have been found completely in compliance with Title VI.

Even if the plaintiffs succeed in fully reinstating their right to proceed with the Adams case, it is obvious that recourse to the courts is insufficient to induce OCR to comply fully with its responsibilities under the statutes. The painful lesson to be drawn from the chronic executive footdragging over the years despite the pending orders in Adams is that only vigorous oversight by the Congress will persuade the agency to do its job properly. The earlier reports by the House Committee on Government Operations in 1985 and 1987 and by the Majority Staff of this

Committee in 1988 have been important supportive steps. We respectfully urge the most rigorous scrutiny by this Committee of the civil rights enforcement activities of OCR. Anything less, we fear, will result in complete abdication by the Office for Civil Rights of its crucial responsibilities under these important civil rights statutes.

Chairman OWENS. Thank you.

Dr. Ethel Simon-McWilliams.

Ms. SIMON-MCWILLIAMS. Thank you, Mr. Chairman, and members of the committee, I am Dr. Ethel Simon-McWilliams, Director of the Title IV Desegregation Assistance Center, Region J., located at the Northwest Regional Educational Laboratory, Portland, Oregon. There are ten such centers strategically located throughout the Nation to assist public school personnel, students enrolled in public schools, parents of these students and other community members with addressing problems related to race, sex and desegregation. My center serves Alaska, American Samoa, Guam, Hawaii, Idaho, Northern Mariana Islands, Oregon, Trust Territory of the Pacific Islands and Washington.

I have submitted to you for the record documents from which some of my brief testimony has been taken. They included a report prepared by the Desegregation Assistance Center Directors entitled "The Resegregation of Public Schools: the Third Generation", a report prepared by me entitled, "Desegregation Related Complaints in the Northwest States and Pacific Islands," and an expanded version of the testimony I will provide today.

In many ways, this is one of the most exciting times to be involved in public education. Reforms have been launched that are aimed at improving schools, empowering teachers and engaging students in the process of learning. From the urban schools of Florida to the rural bush schools of Alaska, education reform has taken hold in a variety of ways.

There, also, are frustrating times for many of us who worked through some of the problems of the first and second generations of school desegregation, and who must now contend with the third generation. We can, also, call these the worst of times for the commitment to school desegregation has waned as is evidenced by the reduction in dollars recently appropriated for Title IV desegregation assistance—from $23.4 million to $21.7 million—and, the reduction in the level of effort being expended by the Office for Civil Rights toward enforcing Federal laws which prohibit discrimination based on race, sex and national origin.

I am pleased through this committee we are bringing attention to the segregation that is going on in our schools. In one of the documents I submitted to you, we talk about school desegregation as a three-generational issue. The first generation issue is well understood—the physical segregation of students by race.

The second generation came when, once all children could enter a school building, many schools segregated them by race, gender and language proficiency within classrooms.

A third generation of school desegregation has now evolved. It has grown out of a recognition of a new mix of problems. Renewed physical segregation coupled with desegregation related problems such as increased racial harassment of minority students, particularly of black students in my region, the Pacific Northwest. In one district such harassment was at a level that it warranted the participation of a task force.

From that task force, a study was conducted. In this document, you will see overwhelming evidence of race discrimination of our black boys and girls.

Another article in the Sunday Oregonian Discipline, headline, "District concern that most cases involve minorities."

Yes, we still have desegregation-related problems as well as segregation within our schools.

The third generation is particularly perplexing because it includes a mix of first and second generation problems or resegregation.

Problems continue to be apparent in practices such as:

School policies and procedures which result in race of gender identifiable outcomes; program counseling or assignments which create classes that are racially, ethnically or gender identifiable; denial of adequate language instruction or provision of adequate levels of English instruction and preparation; grouping practices between classes or within classes which create racial, ethnic or single sex identifiable groups for extended periods of time; extracurricular activities which evolve into racial, ethnic or single sex identifiable groups; and school faculty which can be identified by race, ethnic group or sex for consistent assignments to specific academic courses or positions.

While it is true that many school districts currently operate "unitary" schools which are physically desegregated, it is also true that many districts in all parts of the country have not lived up to their constitutional obligations or have taken a passive position which has not kept pace with increased minority enrollments or racial changes in housing patterns.

In either case, the fact remains that a large percentage of minority students in grades K-12—who attend schools in districts which have a substantial number of non-minority students—continue to attend schools and participate in classes which are clearly racially or ethnically identifiable. Thus, the first generation problem is once again recognized as being alive and ugly as ever. Those first generation problems that the Office for Civil Rights indicated that it has settled need monitoring.

To complicate matters, Office for Civil Rights Enforcement efforts related to desegregation are at an all time low. The reason given in my region is that the office is overwhelmed with cases related to Section 504 of the Rehabilitation Act.

This is not to say that progress has not been made. Most school districts have, in fact, achieved some degree of desegregation. But it is evident as the desegregation centers' level of assistance increases, a great deal is still to be done.

We have lived through implementation of activities—I have been involved in providing desegregation assistance for 18 years. Therefore, that which I am presenting is that which I am now living and I have also lived. So we have lived through implementation of activities which were to have eliminated problems occasioned by desegregation such as emergency school aid act alternative schools and other programs, and through other educational reforms that attempted to provide equitable education for all students within a desegregated environment.

Some of these programs did have a positive impact with assistance of desegregation centers. However, we must remember that at that time—during the 60s and 70s—the Office for Civil Rights exercised a very high level of enforcement activities, and worked very closely with the desegregation centers to assure that desegregating schools requested training and technical assistance. We must pay attention to the resegregation that is now occurring.

The cost to society for students who dropped out of our educational systems, because they were not experiencing academic success, was not of primary concern during the 60s and 70s. For jobs were still available in most parts of the Nation for those without high school diplomas.

Most recently, I must say since the issuing of reports such as "The Nation at Risk", and since the business community has become more vocal toward our education system—and toward the products we are sending into the marketplace—this concern has extended to one of students not making successful transitions to productive adults lives. This is partly due to the complexity of our technological society. The cost to society of persons who do not participate productively in the work force must now be more concretely estimated. What is more concrete than counting money?

The cost to the Nation for these persons in foregone earnings and higher utilization of services such as welfare, unemployment compensation and other social services is astronomical. Other social costs related to unfinished education can be seen by our over-crowded prison systems.

Most of these costs which I have noted are the direct result of society's sacrifice of equity and of problems related to the resegregation of our schools. This should be a pressing national problem. Pressing because the pocketbooks of all Americans, yours and mine included, will be impacted.

We must pay attention to the continuing work of the ten desegregation assistance centers which includes revisions of desegregation plans, workshops that sensitize teachers and administrators to issues of multi-cultural education, academic performance of minority students, self-esteem building, training on racial conflict management, and other areas of race, sex and national origin equity.

We must demand that schools not celebrate their success until all of our children are a part of that success. We must not be lulled by those who see parental choice or any other program as a panacea for the ills of education. We must personally look into programs and determine why some work, and why some do not. And we must determine what effect they are having. We must recognize that some will use reform programs as a means to resegregate their schools, while others will experience unintentional resegregation.

Yes, we are experiencing resegregation in our public schools. Yes, we can overcome this resegregation. With continued support from desegregation assistance centers, closer attention to student outcomes, and a higher level of involvement by the Office for Civil Rights, we can move more quickly to a truly desegregated system of public education.

I will stop and entertain questions from anyone who has spoken before, anyone who has had a chance to read my documents and any other questions one may have because of information I have not provided.

Thank you.

[The prepared statement of Ethel Simon-McWilliams follows:]

TESTIMONY BY

DR. ETHEL SIMON-MCWILLIAMS, DIRECTOR
DESEGREGATION ASSISTANCE CENTER
NORTHWEST REGIONAL EDUCATIONAL LABORATORY
PORTLAND, OREGON
BEFORE THE
COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES
2175 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515

NOVEMBER 28, 1989

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. I AM DR. ETHEL SIMON-MCWILLIAMS, DIRECTOR OF THE TITLE IV DESEGREGATION ASSISTANCE CENTER, REGION J., LOCATED AT THE NORTHWEST REGIONAL EDUCATIONAL LABORATORY, PORTLAND, OREGON. THERE ARE TEN SUCH CENTERS STRATEGICALLY LOCATED THROUGHOUT THE NATION TO ASSIST PUBLIC SCHOOL PERSONNEL, STUDENTS ENROLLED IN PUBLIC SCHOOLS, PARENTS OF THESE STUDENTS AND OTHER COMMUNITY MEMBERS WITH ADDRESSING PROBLEMS RELATED TO DESEGREGATION. MY CENTER SERVES ALASKA, AMERICAN SAMOA, GUAM, HAWAII, IDAHO, NORTHERN MARIANA ISLANDS, OREGON, TRUST TERRITORY OF THE PACIFIC ISLANDS AND WASHINGTON.

I HAVE SUBMITTED TO YOU FOR THE RECORD DOCUMENTS FROM WHICH SOME OF MY BRIEF TESTIMONY HAS BEEN TAKEN. (1) A REPORT PREPARED BY THE DESEGREGATION ASSISTANCE CENTER DIRECTORS ENTITLED, **"THE RESEGREGATION OF PUBLIC SCHOOLS: THE THIRD GENERATION"**, (2) A REPORT PREPARED BY ME ENTITLED, **"DESEGREGATION RELATED COMPLAINTS IN THE NORTHWEST STATES AND PACIFIC ISLANDS," AND (3) AN EXPANDED VERSION OF THE TESTIMONY I WILL PROVIDE TODAY.**

IN MANY WAYS, THIS IS ONE OF THE MOST EXCITING TIMES TO BE INVOLVED IN PUBLIC EDUCATION. REFORMS HAVE BEEN LAUNCHED THAT ARE AIMED AT IMPROVING SCHOOLS, EMPOWERING TEACHERS AND ENGAGING STUDENTS IN THE PROCESS OF LEARNING. FROM THE URBAN SCHOOLS OF FLORIDA TO THE RURAL BUSH SCHOOLS OF ALASKA, EDUCATIONAL REFORM HAS TAKEN HOLD IN A VARIETY OF WAYS.

THESE, ALSO, ARE FRUSTRATING TIMES FOR MANY OF US WHO WORKED THROUGH SOME OF THE PROBLEMS OF THE FIRST AND SECOND GENERATIONS OF SCHOOL DESEGREGATION, AND WHO MUST NOW CONTEND WITH THE THIRD GENERATION. WE CAN, ALSO, CALL THESE THE WORST OF TIMES FOR THE COMMITMENT TO SCHOOL DESEGREGATION HAS WANED AS IS EVIDENCED BY THE REDUCTION IN DOLLARS RECENTLY APPROPRIATED FOR TITLE IV DESEGREGATION ASSISTANCE-FROM $23.4 MILLION TO $21.7 MILLION--AND, THE REDUCTION IN THE LEVEL OF EFFORT BEING EXPENDED BY THE OFFICE OF CIVIL RIGHTS TOWARD ENFORCING FEDERAL LAWS WHICH PROHIBIT DISCRIMINATION BASED ON RACE, SEX AND NATIONAL ORIGIN.

WE TALK ABOUT SCHOOL DESEGREGATION AS A THREE-GENERATIONAL ISSUE. THE FIRST GENERATION ISSUE IS WELL UNDERSTOOD (THE PHYSICAL SEGREGATION OF STUDENTS BY RACE).

THE SECOND GENERATION CAME WHEN, ONCE ALL CHILDREN COULD ENTER A SCHOOL BUILDING, MANY SCHOOLS SEGREGATED THEM BY RACE, GENDER AND LANGUAGE PROFICIENCY WITHIN CLASSROOMS.

A THIRD GENERATION OF SCHOOL DESEGREGATION HAS NOW EVOLVED. IT HAS GROWN OUT OF A RECOGNITION OF A NEW MIX OF PROBLEMS. RENEWED PHYSICAL SEGREGATION COUPLED WITH DESEGREGATION RELATED PROBLEMS SUCH AS INCREASED RACIAL HARRASSMENT OF MINORITY STUDENTS, PARTICULARLY OF BLACK STUDENTS IN MY REGION, THE PACIFIC NORTHWEST; LOW EXPECTATIONS OF MINORITY CHILDREN, CULTURAL BIAS OF MANY INSTRUCTIONAL MATERIALS AND METHODS, LACK OF MULTICULTURAL MATERIALS AND CULTURAL SENSITIVITIES, PERSISTENCE OF RACE STEREOTYPING AND BIAS, AND CLASS ASSIGNMENTS THAT ISOLATE STUDENTS ON THE BASIS OF RACE, NATIONAL ORIGIN, OR GENDER. THE THIRD GENERATION IS PARTICULARILY PERPLEXING BECAUSE IT INCLUDES A MIX OF FIRST AND SECOND GENERATION PROBLEMS OR RESEGREGATION.

PROBLEMS CONTINUE TO BE APPARENT IN PRACTICES SUCH AS:

- SCHOOL POLICIES AND PROCEDURES WHICH RESULT IN RACE OR GENDER IDENTIFIABLE OUTCOMES (DISCIPLINE REFERRALS, SUSPENSION AND EXPULSION RATES, LIMITED COMPETITIVE SPORTS FOR FEMALES).
- PROGRAM COUNSELING OR ASSIGNMENTS WHICH CREATE CLASSES THAT ARE RACIALLY, ETHNICALLY OR GENDER IDENTIFABLE (OVERREPRESENTATION OF MINORITIES IN SPECIAL EDUCATION AND VOCATIONAL EDUCATION PROGRAMS VS. UNDERREPRESENTATION IN GIFTED AND COLLEGE PREP PROGRAMS: SINGLE SEX CLASSES: TRACKING OF LEP STUDENTS, ETC.)
- DENIAL OF ADEQUATE LANGUAGE INSTRUCTION OR PROVISION OF ADEQUATE LEVELS OF ENGLISH INSTRUCTION AND PREPARATION.
- GROUPING PRACTICES BETWEEN CLASSES OR WITHIN CLASSES WHICH CREATE RACIAL, ETHNIC OR SINGLE SEX IDENTIFIABLE GROUPS FOR EXTENDED PERIODS OF TIME.

- EXTRACURRICULAR ACTIVITIES WHICH EVOLVE INTO RACIAL, ETHNIC OR SINGLE SEX IDENTIFIABLE GROUPS (NATIONAL HONOR SOCIETY, CHEMISTRY CLUB, CHEERLEADING, COMPETITIVE SPORTS, SCHOOL-SPONSORED CLUBS).
- SCHOOL FACULTY WHICH CAN BE IDENTIFED BY RACE, ETHINIC GROUP OR SEX FOR CONSISTENT ASSIGNMENTS TO SPECIFIC ACADEMIC COURSES OR POSITIONS (ADMINISTRATORS, MATHEMATICS AND SCIENCE TEACHERS, COACHES, VOCATIONAL TEACHERS)

WHILE IT IS TRUE THAT MANY SCHOOL DISTRICTS CURRENTLY OPERATE "UNITARY" SCHOOLS WHICH ARE PHYSICALLY DESEGREGATED, IT IS ALSO TRUE THAT MANY DISTRICTS IN ALL PARTS OF THE COUNTRY HAVE NOT LIVED UP TO THEIR CONSTITUTIONAL OBLIGATIONS OR HAVE TAKEN A PASSIVE POSITION WHICH HAS NOT KEPT PACE WITH INCREASED MINORITY ENROLLMENTS OR RACIAL CHANGES IN HOUSING PATTERNS. IN EITHER CASE, THE FACT REMAINS THAT A LARGE PERCENTAGE OF MINORITY STUDENTS IN GRADES K-12 (WHO ATTEND SCHOOLS IN DISTRICTS WHICH HAVE A SUBSTANTIAL NUMBER OF NONMINORITY STUDENTS) CONTINUE TO ATTEND SCHOOLS AND PARTICIPATE IN CLASSES WHICH ARE CLEARLY RACIALLY OR ETHNICALLY IDENTIFIABLE. THUS, THE FIRST GENERATION PROBLEM IS ONCE AGAIN RECOGNIZED AS BEING ALIVE AND UGLY AS EVER. TO COMPLICATE MATTERS, OFFICE OF CIVIL RIGHTS ENFORCEMENT EFFORTS RELATED TO DESEGREGATION ARE AT AN ALL TIME LOW. THE REASON GIVEN IN MY REGION IS THAT THE OFFICE IS OVERWHELMED WITH CASES RELATED TO SECTION 504 OF THE REHABILITATION ACT.

THIS IS NOT TO SAY THAT PROGRESS HAS NOT BEEN MADE. MOST SCHOOL DISTRICTS HAVE, IN FACT, ACHIEVED SOME DEGREE OF DESEGREGATION. BUT IT IS EVIDENT AS THE DESEGREGATION CENTERS' LEVEL OF ASSISTANCE INCREASES THAT A GREAT DEAL IS STILL TO BE DONE.

WE HAVE LIVED THROUGH IMPLEMENTATION OF ACTIVITIES WHICH WERE TO HAVE ELIMINATED PROBLEMS OCCASIONED BY DESEGREGATION SUCH AS EMERGENCY SCHOOL AID ACT ALTERNATIVE SCHOOLS AND OTHER PROGRAMS, AND THROUGH OTHER EDUCATIONAL REFORMS THAT ATTEMPTED TO PROVIDE EQUITABLE EDUCATION FOR ALL STUDENTS WITHIN A DESEGREGATED ENVIRONMENT. SOME OF THESE PROGRAMS DID HAVE A POSITIVE IMPACT

WITH ASSISTANCE OF DESEGREGATION CENTERS. HOWEVER, WE MUST REMEMBER THAT AT THAT TIME (DURING THE 60's and 70's) THE OFFICE OF CIVIL RIGHTS EXERCISED A VERY HIGH LEVEL OF ENFORCEMENT ACTIVITIES, AND WORKED VERY CLOSELY WITH THE DESEGREGATION CENTERS TO ASSURE THAT DESEGREGATING SCHOOLS REQUESTED TRAINING AND TECHNICAL ASSISTANCE. WE MUST PAY ATTENTION TO THE RESEGREGATION THAT IS NOW OCCURING. THE COST TO SOCIETY FOR STUDENTS WHO DROPPED OUT OF OUR EDUCATIONAL SYSTEMS, BECAUSE THEY WERE NOT EXPERIENCING ACADEMIC SUCCESS, WAS NOT OF PRIMARY CONCERN DURING THE 60's AND 70's. FOR JOBS WERE STILL AVAILABLE IN MOST PARTS OF THE NATION FOR THOSE WITHOUT HIGH SCHOOL DIPLOMAS.

MOST RECENTLY, I MUST SAY SINCE THE ISSUING OF REPORTS SUCH AS "THE NATION AT RISK", AND SINCE THE BUSINESS COMMUNITY HAS BECOME MORE VOCAL TOWARD OUR EDUCATION SYSTEM--AND TOWARD THE PRODUCTS WE'RE SENDING INTO THE MARKETPLACE--THIS CONCERN HAS EXTENDED TO ONE OF STUDENTS NOT MAKING SUCCESSFUL TRANSITIONS TO PRODUCTIVE ADULT LIVES. THIS IS PARTLY DUE TO THE COMPLEXITY OF OUR TECHNOLOGICAL SOCIETY. THE COST TO SOCIETY OF PERSONS WHO DO NOT PARTICIPATE PRODUCTIVELY IN THE WORK FORCE MUST NOW BE MORE CONCRETELY ESTIMATED. WHAT IS MORE CONCRETE THAN COUNTING MONEY?

THE COST TO THE NATION FOR THESE PERSONS IN FOREGONE EARNINGS AND HIGHER UTILIZATION OF SERVICES SUCH AS WELFARE, UNEMPLOYMENT COMPENSATION AND OTHER SOCIAL SERVICES IS ASTRONOMICAL. OTHER SOCIAL COSTS RELATED TO UNFINISHED EDUCATION CAN BE SEEN BY OUR OVER-CROWDED PRISON SYSTEMS.

MOST OF THESE COSTS WHICH I HAVE NOTED ARE THE DIRECT RESULT OF SOCIETY'S SACRIFICE OF EQUITY AND OF PROBLEMS RELATED TO THE RESEGREGATION OF OUR SCHOOLS. BY THE YEAR 2000 IT IS PROJECTED THAT THERE WILL BE A ONE TO ONE CORRELATION BETWEEN THOSE IN THE WORKFORCE AND THOSE DRAWING PENSIONS. CLEARLY, THE NEED TO IDENTIFY AND ASSIST OUR CHILDREN IN TODAYS SCHOOLS WHO ARE AT-RISK OF NOT JOINING THIS EVER DWINDLING WORK FORCE, SHOULD BE A

PRESSING NATIONAL PROBLEM. PRESSING BECAUSE THE POCKETBOOKS OF ALL AMERICANS, YOURS AND MINE INCLUDED, WILL BE IMPACTED.

WE OFTEN HEAR SOME BOAST OF HOW PROGRAMS IN THEIR SCHOOLS HAVE HAD POSITIVE IMPACTS ON STUDENTS LEARNING. I SAY SOME HAVE. SCHOOL OFFICIALS ACROSS THE NATION ARE ABLE TO SAY: "LOOK, OUR SAT SCORES ARE UP." AND, "LOOK, OUR KIDS ARE READING BETTER." AND, "LOOK, OUR KIDS ARE ABLE TO MAKE THE CONNECTIONS BETWEEN THE NEW INFORMATION THEY GAIN AND THE PERSONAL KNOWLEDGE AND BELIEFS THEY POSSESS."

AND I SAY, "THAT'S ALL WELL AND GOOD." BUT I ALSO ASK, "WHICH KIDS ARE YOU TALKING ABOUT? WHOSE PROGRESS ARE YOU MEASURING? WHAT STANDARDS ARE YOU USING?" AND, PERHAPS MOST IMPORTANTLY, "WHO ARE YOU LEAVING OUT?" PLEASE READ THE 10 DESEGREGATION ASSISTANCE CENTER DIRECTORS' REPORT ENTITLED **"RESEGREGATION OF PUBLIC SCHOOLS: THE THIRD GENERATION."** IN THIS DOCUMENT YOU'LL FIND SOME OF THE ANSWERS TO QUESTIONS I JUST POSED AS WELL AS THE TYPES OF ASSISTANCE THE DESEGREGATION ASSISTANCE CENTERS ARE PROVIDING TO ADDRESS PROBLEMS OF RESEGREGATION.

AN ELEMENTARY SCHOOL'S EXPERIENCE PROVIDES A LESSON FOR ALL OF US CONCERNED ABOUT CONDITIONS WITHIN OUR DESEGREGATED SCHOOL. THIS SCHOOL, LOCATED IN THE PACIFIC NORTHWEST, WAS INVOLVED IN A TWO-YEAR PROGRAM TO IMPROVE PERFORMANCE IN LANGUAGE ARTS. AND IMPROVE IT DID.

FROM 1987 to 1988, THE PERCENTAGE OF THE TOTAL SCHOOL POPULATION IN THE TOP QUARTILE OF THE SCHOOL'S STANDARDIZED TEST SCORES IN LANGUAGE ARTS HAD INCREASED FROM 23 TO 38 PERCENT. THE PERCENTAGE IN THE LOWEST QUARTILE HAD DECREASED FROM 23 TO 17 PERCENT. DATA SHOWED THAT MORE STUDENTS WERE SUCCEEDING AT HIGHER LEVELS IN THIS SCHOOL.

BUT THAT SUCCESS, WITH ENCOURAGEMENT FROM OTHERS, LED TO MORE INDEPTH EXAMINATION OF DATA AND AN UNDERSTANDING OF DISCREPANCIES IN PERFORMANCE AMONG RACIAL GROUPS. SCHOOL OFFICIALS DISAGGREGATED THE SCHOOLWIDE DATA BY RACE. WHAT DID THEY FIND?

WHILE ONLY 17 PERCENT OF THE TOTAL SCHOOL POPULATION WAS NOW IN THE LOWEST QUARTILE, 32 PERCENT OF A MINORITY STUDENT POPULATION PERFORMED AT THIS LEVEL.

BY DISAGGREGATING TEST DATA BY RACE, THE DISTRICT FOUND THAT ITS BOAST OF SUCCESS WAS PREMATURE.

DISAGGREGATED DATA NEED TO BE ANALYZED TO ASCERTAIN THE REAL SUCCESS OF ALL SCHOOL PROGRAMS. FOR SUCCESS NEEDS TO BE MEASURED BY THE ACHIEVEMENT OF ALL STUDENTS--OR OUTCOMES.

WE MUST PAY ATTENTION TO THE CONTINUING WORK OF THE TEN DESEGREGATION ASSISTANCE CENTERS WHICH INCLUDES REVISIONS OF DESEGREGATION PLANS, WORKSHOPS THAT SENSITIZE TEACHERS AND ADMINISTRATORS TO ISSUES OF MULTICULTURAL EDUCATION, ACADEMIC PERFORMANCE OF MINORITY STUDENTS, SELF-ESTEEM BUILDING, TRAINING ON RACIAL CONFLICT MANAGEMENT, AND OTHER AREAS OF RACE, SEX AND NATIONAL ORIGIN EQUITY.

WE MUST DEMAND THAT SCHOOLS NOT CELEBRATE THEIR SUCCESS UNTIL ALL OF OUR CHILDREN ARE A PART OF THAT SUCCESS. WE MUST NOT BE LULLED BY THOSE WHO SEE PARENTAL CHOICE OR ANY OTHER PROGRAM AS A PANACEA FOR THE ILLS OF EDUCATION. WE MUST PERSONALLY LOOK INTO PROGRAMS AND DETERMINE WHY SOME WORK, AND WHY SOME DO NOT. AND WE MUST DETERMINE WHAT EFFECT THEY'RE HAVING. WE MUST RECOGNIZE THAT SOME WILL USE REFORM PROGRAMS AS A MEANS TO RESEGREGATE THEIR SCHOOLS, WHILE OTHERS WILL EXPERIENCE UNINTENTIONAL RESEGREGATION.

THOUGH MOST OF THE REFORMS ARE FINE IN CONCEPT, THEY MUST BE DRIVEN BY A STANDARD OF EQUITY THAT ALLOWS ALL STUDENTS TO HAVE THE OPPORTUNITY TO SUCCEED. TOO OFTEN, DESEGREGATION IS LOST IN EFFORTS TO REFORM SCHOOLS BASED ON STANDARDS OF COMPETITIVENESS, AGGRESSIVENESS AND SURVIVAL OF THE FITTEST.

FOR EXAMPLE, "SOME" MAGNET SCHOOLS ARE DESIGNED TO PROVIDE A FEW STUDENTS WITH FAR MORE EDUCATIONAL RESOURCES THAN THOSE ENJOYED BY THE VAST MAJORITY. WE MUST ASK (BEFORE IMPLEMENTATION) IF THIS TYPE OF PROGRAM CAN TRULY OFFER AN EQUITABLE SOLUTION TO THE DESEGREGATION PROBLEM WE'RE ATTEMPTING TO ADDRESS OR WILL IT RESULT IN RESEGREGATION. THIS IS THE TYPE OF QUESTION POSED TO SCHOOLS BY THE DESEGREGATION ASSISTANCE CENTERS.

I SHUDDER, WHEN I READ COMMENTS SUCH AS "PUBLIC SCHOOL CHOICE WILL FORCE THE SYSTEM TO PUT COMPETITION BACK INTO EDUCATION...TO UPGRADE THE SECOND-RATE SCHOOLS OR CLOSE THEM." WHAT WILL HAPPEN TO THOSE STUDENTS LEFT ATTENDING WHAT SOME CALL THE "SECOND-RATE SCHOOL?" WILL THIS EFFORT RESULT IN RESEGREGATION? I SHUDDER, BECAUSE IN A SYSTEM BASED ON SURVIVAL OF THE FITTEST, WE KNOW WHO WILL BE LEFT TO FEND FOR THEMSELVES.

YES, WE ARE EXPERIENCING RESEGREGATION IN OUR PUBLIC SCHOOLS. YES, WE CAN OVERCOME THIS RESEGREGATION. WITH CONTINUED SUPPORT FROM DESEGREGATION ASSISTANCE CENTERS, CLOSER ATTENTION TO STUDENT OUTCOMES, AND A HIGHER LEVEL OF INVOLVEMENT BY THE OFFICE OF CIVIL RIGHTS, WE CAN MOVE MORE QUICKLY TO A TRULY DESEGREGATED SYSTEM OF PUBLIC EDUCATION.

REPORT OF DESEGREGATION RELATED COMPLAINTS
IN THE
NORTHWEST AND PACIFIC

Prepared by

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REPORT OF DESEGREGATION RELATED COMPLAINTS IN THE NORTHWEST AND PACIFIC

Prepared By
Dr. Ethel Simon-McWilliams
and
A. Kent Gorham

This report presents information on the following:

1) The number, type, location and disposition of complaints filed by, or on behalf of, K-12 students alleging unlawful discrimination in educational opportunities on the basis of national origin, race or sex equity.

2) The number, type, location and disposition of complaints filed by, or on behalf of, public school personnel alleging unlawful discrimination in employment practices.

3) Implications for services from the Desegregation Assistance Center.

Data presented in this report were furnished by five (5) primary sources: United States Department of Education - Office of Civil Rights (OCR) - San Francisco, Seattle and Washington D.C. offices; Office of Oregon Congressman Ron Wyden and the Oregon State Department of Education. It should be understood that this report is not exhaustive but presents information made available at this time.

The Department of Education's Office of Civil Rights is responsible for enforcing federal laws which prohibit discrimination based on race, national origin, sex, handicap or age in all educational programs. This enforcement power is authorized by the Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. The Civil Rights Restoration Act of 1988 restores the originally intended scope of the aforementioned laws to be institution-wide rather than program specific.

The laws require OCR to investigate complaints of discrimination and conduct compliance reviews in areas where discrimination may be a systemic problem. When violations of law are found, either by the primary method of complaint investigations or the secondary method of compliance reviews and the violator is unwilling to voluntarily correct the problem, OCR has two (2) enforcement avenues at its disposal. OCR can: 1) seek the termination of federal funds by bringing the case before an administrative law judge--a process called issuing a "notice of opportunity for hearing" or; 2) refer the case to the Department of Justice which can sue the violator to force compliance with the law.

Until recently, OCR had been required to conduct investigations according to certain timeframes and procedures mandated under an order imposed by the United States District Court for the District of Columbia in Adams v. Califano (1977) and modified twice in 1983 as a result of Adams v. Bell, a continuation of the case.

The Adams order dictated the following timetable for all of OCR's civil rights complaint investigations and compliance reviews:

Complaint Investigations

OCR must acknowledge a complaint within fifteen (15) calendar days and inform the complainant whether the complaint is complete or incomplete.

If the complaint is complete, OCR must notify the complainant within fifteen (15) days of the receipt of the complaint whether it has jurisdiction over the allegations and whether an on-site investigation will be conducted.

If the complaint is incomplete, OCR must notify the complainant. If the information required to complete the complaint is not provided within sixty (60) days, OCR may close the complaint.

Within fifteen (15) days of the receipt of a complete complaint, OCR must notify the affected institution of the nature of the complaint and the procedures and laws to be followed in investigating the complaint, including whether an on-site visit is planned.

Findings must be issued within 105 days of the receipt of a complaint.

In cases where a violation of law is found, OCR must bring the affected institution into compliance within 195 days of the receipt of the complaint and, if corrective action is not secured by that time, OCR must initiate enforcement proceedings within 225 days after the receipt of the complete complaint.

Compliance Reviews

Within ninety (90) days of the date a review commences, OCR must determine if the affected institution is in compliance with applicable laws regarding the issue investigated.

If corrective action is not achieved within 180 days of the commencement of a review resulting in negative findings, OCR must initiate enforcement proceedings within 210 days of commencement.

In December 1987, United States District Court Judge John Pratt dismissed the case, Adams v. Bennett, first filed seventeen (17) years ago by the NAACP Legal Defense and Education Fund, ruling that the plaintiffs no longer had legal standing or the right to sue. (See footnote #1)

I. Title VI and IX Activity - OCR San Francisco

The OCR - San Francisco office reports the following information: Between February 1984 and November 1987 a total of six (6) complaints of alleged unlawful discrimination in elementary/secondary schools were filed against the Hawaii Department of Education.

In 1984, four (4) complaints were received and all four were Title VI actions based on race/national origin - Asian/Pacific Islander (one complaint also involved a charge of sex discrimination - Title IX). Two (2) of the cases were brought by administrative and managerial staff, one (1) by a staff member for students whose Primary or Home Language is Other Than English (PHLOTE) and the fourth was a class action. The issues in the four (4) cases were alleged unlawful discriminatory conduct in: 1) recruitment, criteria for selection and training; 2) hiring criteria for selection, selection process and procedures, assignment of PHLOTE students, language assessment, placement and exit criteria, qualifications/quality of staff; 3) retaliation and; 4) PHLOTE identification, language assessment, placement, exit criteria and other assignment of PHLOTE students issue.

In 1985 two (2) complaints were received, both filed by students. One complaint was based on Title VI - reverse race discrimination (non-minority white) and the other was based on Titles VI and IX - the complainant's status as an Asian/Pacific Islander, non-minority white, reverse discrimination against males. The issues in the two (2) cases were alleged unlawful discriminatory conduct in: 1) students rights, retaliation and harrassment and; 2) criteria for awards and honors, selection process/procedures and distribution of awards and honors.

Enforcement Action Taken by OCR - Title VI and Title IX

There were a total of six (6) complaints filed with the OCR in San Francisco and in two (2) instances violations were found to have occurred and corrective action plans were adopted and are being monitored.

The reasons given for the remainder of the complaint closures indicated that in three (3) instances no violation was found and the last case was closed because the complaint was not completed. (Appendix A)

II. Title IX Activity - OCR Seattle

The OCR - Seattle office reports the following information: Between December 1984 and December 1987 a total of seventeen (17) complaints of alleged unlawful discrimination in elementary/secondary schools were filed under Title IX - based on sex. All but two (2) of the filings were by students.

In 1984 two (2) complaints were filed, 1985 eleven (11), 1986 one (1) and 1987 three (3). The most recurring specific charge brought, it occurred eight (8) times, was in athletics--the failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.

Four (4) other charges were brought twice. They included: 1) provision of the necessary athletic equipment, supplies and facilities for all students; 2) the scheduling of games and practice times; 3) the provision of equivalent opportunity to travel and equivalent per diem allowances and; 4) the equivalent provision of publications and other promotional devices, sports information personnel and access to other publicity resources. Other complaints dealing with athletics included: interest and abilities of students, assignment/compensation of coaching staff, opportunity to receive coaching and other athletics issue.

The following charges by students appeared only once: criteria for participation in and selection process and procedures for student organization/activities; disciplinary criteria for students; student rights; harrassment; academic evaluation/grading; failure to provide/keep information required by Title IX; failure to adopt, implement or adhere to procedures required by OCR; and grievance procedures/due process.

Also appearing only once were the following complaint issues in the area of employee rights: hiring; recruitment; selection; criteria for selection; demotion, dismissal, disciplinary action; other employee demotion, dismissal or disciplinary issue; employee rights and criteria for disciplinary action.

Enforcement Action Taken By OCR - Title IX

While there were seventeen (17) Title IX complaints filed with the OCR in Seattle, in only one (1) instance was there a violation found. This was in a three-part complaint filed by a student alleging: 1) the failure to ensure administrative policies that are essential to the provision of equal educational opportunity and which are provided in accordance with regulatory requirements and do not result in discriminatory effect; 2) the failure to adopt, implement or adhere to administrative procedures required by the regulations which OCR enforces and; 3) the adoption, publication and continuing implementation of grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging discriminatory action.

The reasons given for the remainder of the complaint closures indicate that in seven (7) instances the complaints were withdrawn after the complainant achieved the changes desired. Two (2) complaints were not timely and two (2) others were not completed. In one (1) complaint there was a lack of jurisdiction, in another OCR had jurisdiction but another agency would process the complaint. There was no violation found in one (1) complaint and one (1) charge was found to be patently frivolous. In one (1) instance no reason was given for the closure. (Appendix B)

Title VI Activity

During the same time period, the Seattle office reports that a total of thirty (30) complaints of unlawful discrimination in elementary/secondary schools were filed under Title VI - race/ national origin. Twenty (20) of the filings were by students, seven (7) were by applicant(s)/employee(s) and three (3) were jointly filed by student(s)/applicant(s)/employee(s). For 1984 one (1) complaint is listed, 1985 six (6), 1986 nine (9) and 1987 thirteen (13) (one appears to be a carryover from prior to 1984).

The two most recurring charges brought, which showed up four (4) times each, were the following: 1) subjecting students to harrassment and; 2) selection process and procedures for employment. Appearing three (3) times each were: 1) disciplinary criteria for students; 2) corporal punishment; 3) hiring and; 4) criteria for selection/hiring. Showing up twice were: 1) retaliation against students; 2) assignment to program for gifted and talented students; 3) suspension of students; 4) discriminatory policies regarding applications for employment; 5) discriminatory policies regarding review and selection of applicants; 6) application requirements/forms and; 7) methods of recruitment.

The remaining charges brought by students were: staffing that perpetuates racial/ethnic identity of schools, programs or classes; assignment to schools that results in discriminatory effect; identification, evaluation and placement of students in programs for the gifted and talented; assignment within schools; criteria for assignment within schools; expulsion and other discipline issues; failure to ensure students are afforded equal treatment; failure to keep or provide information required by Title VI; grievance procedures and due process; inequitable provision of support services not part of the academic curriculum; financial assistance and scholarships; criteria for participation in student organisations/activities and selection process/procedures; placement of PHLOTE students; criteria for selection to an education program; placement and referral of students with physical or mental impairments; academic tutoring; transportation; distribution of administrative funds that results in inequitable or discriminatory allocation; and other student rights issues.

The remaining charges brought by employees were: recruitment; processing applications; employee evaluation/treatment; other employee evaluation/treatment issues; promotion, demotion/dismissal/disciplinary action; employee rights; retaliation and harrassment.

Enforcement Action Taken By OCR - Title VI

While there were thirty (30) Title VI complaints filed with the OCR in Seattle, in only one (1) instance did the complainant achieve the results desired. On this occasion the complainant was an employee who withdrew a two-part complaint alleging the discriminatory effect of: 1) the standards, rules and eligibility requirements for promotion and; 2) the manner in which promotion criteria is considered and decisions are made.

The reasons given for the remainder of the complaint closures indicate that in four (4) instances OCR found that it had jurisdiction, but another agency would process the complaint. (Either the Justice Department, state or local agency.)

In seven (7) instances the investigations found no violations and in another seven (7) cases the complaint was not completed. On two (2) occassions OCR had no jurisdiction over the subject matter. In the remaining cases OCR found it had no jurisdiction over the institution; no jurisdiction over the subject matter and referred the case to another agency; the complaint was not timely; the complaint was withdrawn without benefit to the complainant; and the complaint was patently frivolous. There are four (4) complaints which remain open. (Appendix C)

Compliance Reviews

For fiscal years 1984 through November 1987, OCR in Seattle conducted a total of twelve (12) compliance reviews, three (3) Title IX and nine (9) Title VI.

One (1) Title IX compliance review was conducted in 1985 in Oregon at which time a violation was noted and a correction letter sent. In 1986 two (2) Title IX compliance reviews were held in Alaska and no violations were noted.

One (1) Title VI compliance review was conducted in Washington in 1984 at which time a violation was noted and a correction letter sent. In 1985 three (3) reviews were conducted, violations were noted in two (2) instances and correction letters sent to Idaho and Oregon. No violations were noted in Washington. In 1986 four (4) reviews were conducted, two (2) in Alaska and one (1) each in Idaho and Oregon. The reviews found no violations. In 1987 one (1) review was held in Washington with a finding of no violations. Currently two (2) reviews remain open in Oregon and two (2) in Washington.

III. The following general information, obtained during a telephone conversation with the Department of Education/Office of Civil Rights in Washington, D.C. and due to be submitted to Congress in March, concerns all (elementary/secondary and post secondary) OCR national enforcement activities for fiscal years 1987 - received 1,971 complaints/closed 2,197 and initiated 276 compliance reviews/closed 276; 1986 - received 2,649 complaints (of which 515 were brought by a single complainant)/closed 2,796 (of which 641 involved a single complainant) and initiated 196 compliance reviews/closed 208; 1985 - received 2,240 complaints/closed 2,045 and initiated 289 compliance reviews/closed 301; 1984 - received 1,934 complaints/ closed 1,966 and initiated 220 compliance reviews/closed 224; 1983 - received 1,946 complaints/closed 2,264 and initiated 287 compliance reviews/closed 281. All of the closure numbers include action taken in the particular fiscal year and carryovers from previous years.

The reasons given for both complaint and compliance review closures fall into five (5) categories: Administrative Closures*; No Violation; Corrective Action Secured; Administrative Enforcement Proceedings; and Referrals to the Justice Department.

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*Administrative Closure could be based on any one of seventeen (17) reasons, examples of which include: no jurisdiction over the institution, complaint not timely, complainant cannot be located, complaint patently frivolous or complaint not completed.

Regarding Complaints, in 1987 there were 1,052 Administrative Closures, 534 findings of No Violation, 611 Corrective Action Secured, 3 Administrative Enforcement Proceedings and 4 Referred to the Justice Department; in 1986 there were 1,349 Administrative Closures, 494 findings of No Violation, 945 Corrective Action Secured, 9 Administrative Enforcement Proceedings and -0- Referred to the Justice Department; in 1985 there were 776 Administrative Closures, 610 findings of No Violation, 654 Corrective Action Secured, 20 Administrative Enforcement Proceedings and -0- Referred to the Justice Department; in 1984 there were 729 Administrative Closures, 578 findings of No Violation, 639 Corrective Action Secured, 22 Administrative Enforcement Proceedings and 3 Referred to the Justice Department; in 1983 there were 877 Administrative Closures, 613 findings of No Violation, 618 Corrective Action Secured, 2 Administrative Enforcement Proceedings and 17 Referred to the Justice Department.

Regarding Compliance Reviews, in 1987 there were 3 Administrative Closures, 67 findings of No Violation and 206 Corrective Action Secured; in 1986 there were 5 Administrative Closures, 59 Findings of No Violation, and 145 Corrective Action Secured; in 1985 there were 5 Administrative Closures, 82 findings of No Violation and 214 Corrective Action Secured; in 1984 there were 2 Administrative Closures, 60 findings of No Violation and 159 Corrective Action Secured; in 1983 there were 3 Administrative Closures, 82 findings of No Violation and 196 Corrective Action Secured.

IV. Documents supplied by Congressman Wyden's office reveal that on September 29, 1987, the Committee on Government Operation - United States House of Representatives - approved and adopted a report entitled "Failure and Fraud In Civil Rights Enforcement by the Department of Education" (House Report 100-334). The findings in this Committee report are extremely important, to say the least, as one goes about weighing the accuracy and validity of the information reported by the OCR's San Francisco and Seattle Regions.

The most pertinent and poignant aspects of the Committee report are as follows:

A. "Because OCR has demonstrated a historic recalcitrance towards enforcing civil rights laws, the office is virtually controlled by the *Adams* decision...(p. 4)

B. Until the 1983 order in *Adams*, OCR did not seek enforcement in individual cases where violations of law were found and after the 1983 order was issued OCR used new and innovative methods to circumvent the order. One such ruse involved referring cases to DOJ, which was not covered by the *Adams* order...(p. 6)

C. In September 1986 the Justice Department filed a report with the Adams court, informing the court that some employees of the Region I office (Boston) of OCR might have engaged in the practice of backdating documents or failing to follow internal procedures required to track processing of complaints...(p. 37)

D. Backdating was later discovered in OCR regional offices nationwide indicating a systematic problem that may have eminated from the Central office as an unwritten policy... (p. 39)

E. In regard to the backdating, discrepancies were found in seven (7) of twenty (20) cases in Regions X and IX (Seattle and San Francisco)...(p. 40)

F. The Adams order permits a certain percentage of cases to be "tolled", that is, to waive the time requirements if there are legitimate reasons for the investigation to be delayed, such as the unavailability of a witness. The OCR internal review found that the tolling privilege was routinely abused. Cases were systematically tolled when a recipient operating in good faith simply could not meet OCR's timeframe for providing information or was otherwise delayed in providing information. In such circumstances Regions IX and X incorrectly invoked the "witness unavailability tolling provision"...(p. 40)

G. Another serious infraction committed by OCR involved contacting complainants and persuading them to withdraw complaints for the sole purpose of meeting Adams due dates..."(p. 41)

H. "The committee does not believe OCR or the Department of Education/Inspector General conducted a thorough investigation of the backdating of documents, improper tolling of investigative cases, and the improper persuasion of complainants to drop charges of discrimination. Each of their activities was intended to dupe the United States Federal District Court in the Adams case and may have resulted in delays or inaction in cases of illegal discrimination. DOE does not know the extent of the problem, if it continues, or even if investigations were halted of cases involving violations of civil rights laws. Given the high percentages of cases found to be associated with these activities, the committee believes OCR should require its staff to determine how many files were involved in improper actions and what was the involvement of Central Office staff." (Committee Recommendations, p. 43)

V. The Oregon Department of Education (ODOE) was able to supply information for the period of July 1987 to the present concerning the number and type of requests for assistance it has received. Since July ODOE has had eight (8) telephone contacts with school districts, six (6) calls were related to sex equity concerns (sports offerings) and one (1) call was related to race - a sudden and large influx of black students to a school district. Information related to similar activity based on national origin is not available at this time.

VI. In addition to contacts with OCR, Congressman Wyden and Oregon DOE, four (4) of the DACs were contacted to determine if and how they had compiled information of a similar nature related to OCR enforcement efforts in their regions. One DAC reported that it is now setting up a system to track parallel activity in all three (3) areas (national origin, race and sex) and that while the federal government is somewhat inactive the information which is available is provided by the state educational agencies. Data are not now compiled by other DACs.

VII. Conclusions

1. The December, 1987 action of U.S. District Court Judge John Pratt in dismissing the case Adams v. Bennett was a substantial blow to the cause of desegregation. The effect of this dismissal was to remove a previously existing order which required the Office of Civil Rights (OCR) to investigate complaints expeditiously.

2. While the Office of Civil Rights had been required to handle complaints expeditiously from 1972 to 1987, its actual performance in this respect is somewhat suspect. On the national level this was documented in a publication of the United States House of Representatives Committee on Government Operations (House Report 100-334) dated September 29, 1987. Given the dismissal of Adams v. Bennett it seems there is one less incentive to improve in this respect.

3. The San Francisco and Seattle offices of OCR certainly do not appear to have been very vigorous in their investigation of civil rights cases. Although the OCR data appear to be of imperfect quality, they leave the impression that the San Francisco and Seattle offices may have been less vigorous than OCR offices as a whole nationwide. This suggests:

    a. They may not provide leadership in furthering the cause of civil rights. That leadership will have to come from somewhere else.

    b. The lack of quality data hurts the cause of civil rights. The improvement of the quality will have to come from somewhere other than OCR.

4. State Departments of Education and other education agencies continue to express feelings that there are many unmet needs in the area of desegregation of education. However, these needs are not clearly based on documented cases. Again, there is a data problem. Education agencies may be unable to solve that data problem by themselves.

5. The Desegregation Assistance Centers have a continuing important role in providing leadership and providing assistance in matters of educational desegregation and civil rights. The need to exercise that leadership and provide assistance is increased by the apparent reluctance of OCR to do so.

6. The Desegregation Assistance Centers need to take vigorous steps to develop a system of tracking cases and aggregating data which will be useful for strategic purposes as well as for helping with the individual cases. Without clear documentation it will be extremely difficult to document additional needed efforts in the educational desegregation field.

7. The Desegregation Assistance Centers currently have a unique opportunity and responsibility to take the actions suggested in Conclusions 5 and 6 above.

Many challenges and opportunities lie ahead for continued DAC assistance. What follows is a summary of information which forms the foundation for some unanswered questions and future DAC activities in the region.

In submitting its Grant Application to serve as the Desegregation Assistance Center for Region J, U.S. Department of Education's Region X and portions of Region IX, the Laboratory included the following information from the Seattle and San Francisco offices of OCR related to major civil rights concerns and Corrective Action Plans, and concerns mutually identified by the DAC and SEAs:

A. Northwest and Alaska - OCR Seattle
   - Availability and access to athletic programs for women
   - Overrepresentation of minorities, especially Blacks, in special education classes
   - Availability of bilingual programs for language minorities, especially Spanish speaking
   - Proper identification, assessment and placement of limited English proficient students
   - Discriminatory disciplinary procedures for minorities, particularly Blacks
   - Lack of sensitivity, knowledge and understanding of teachers of cultural and ethnic characteristics
   - Lack of understanding of non-minority students of minority cultural and ethnic groups

Hawaii - OCR San Francisco
- Overrepresentation of limited English proficient students in special education classes
- Failure to adequately assess and evaluate language proficiency of students
- Failure to have a system for evaluating language proficiency of students before placement in special education classes
- A disproportionate number of limited English speaking students in vocational education

Guam - OCR San Francisco
- Disproportionate number of limited English proficient students were enrolled in vocational education programs

B. Mutual areas of concern identified by the DAC and Idaho SEA included:

- Instructional capacity building to meet the needs of minority school children
- Human relations training and technical assistance aimed at reducing racial conflict in Idaho's schools
- Development of educational processes that lead to integrated assignment of students in both the school and classroom levels
- Elimination of cultural and linguistic bias and barriers in curriculum and instructional treatment
- Parent and community participation in the educational process of school children
- Adoption of equitable employment opportunity and procedures that would encourage minority recruitment and promotion

Yet, OCR in Seattle indicates not a single complaint being filed in the last three years under Title VI or Title IX and only one (1) Title VI compliance review.

C. Mutual areas of concern identified by the DAC and Oregon SEA included:

- Promotion of equitable employment opportunity and procedures that encourage minority recruitment and promotion
- Elimination of differential treatment of minorities in the disciplinary process
- Parent and community participation in the educational process of school children
- Provision of inservice to districts regarding minority "at risk youth"
- Inclusion of desegregation needs in Oregon's Action Plan for Excellence

Yet, OCR in Seattle reports that only two (2) Title VI and two (2) Title IX complaints were filed during the last three years, one (1) Title IX and two (2) Title VI compliance reviews.

D. Mutual areas of concern identified by the DAC and Alaska SEA included:

- Multicultural bias/fair curriculum offerings
- Development of human relations training activities that would facilitate racial harmony in the schools
- Multicultural education training and technical assistance
- Technical assistance that will provide clarity to the early leavers problem
- Assurance of equal access to educational opportunity
- Development of desegregation plans under Title VI and resolution of problems resulting from the implementation of those plans
- Parent training
- Adoption of equitable employment opportunities and procedures that would encourage minorities and women

Yet, OCR in Seattle notes that not a single complaint was filed in the last three years under Title IX, while six (6) complaints were brought under Title VI. During the same time period two (2) Title IX and two (2) Title VI compliance reviews were conducted.

E. Mutual areas of concern identified by the DAC and Washington SEA included:

- Disproportionality of racial groupings to specific curricular offerings
- Disproportionality of minority student assignments to special evaluation
- Unequal student disciplinary treatment
- Human relations training needs to resolve racial conflict
- Desegregation plan development and resolving problems occasioned by desegregation
- School district staff inservice to assist minorities and females in the educational process of children
- Need to promote awareness regarding interactive behaviors between teachers and students
- Adoption of equitable employment opportunities that would encourage minority promotion

By far, Washington outpaced its border states. The OCR in Seattle reports that in the last three years, fifteen (15) Title IX and twenty-one (21) Title VI complaints were filed, yet there were no Title IX and only three (3) Title VI compliance reviews conducted.

F. Primary areas of need identified by the DAC and Pacific school systems included:

Hawaii
- Continued training in identification, assessment and placement of LEP students
- Multicultural education and parent involvement
- Teaching English in the content areas
- Working with non-English proficient students in the regular classroom
- Continued training in equity issues involved in equitable classroom management techniques

Samoa
- Strategies for teaching English in the content areas
- Language development programs in the primary grades
- Equitable classroom management techniques for new and uncredentialed teachers

Trust Territories
- Equitable classroom management techniques
- Disciplinary practices
- Assessment of student language proficiencies
- Equity awareness in curricular and instructional strategies
- Identifying bias in textbooks and instructional materials
- General awareness of discriminatory practices by all school personnel

Northern Marianas
- Equitable classroom management techniques
- Identification, assessment and placement of limited English proficient students
- Teacher Expectations of Student Achievement and Gender Expectations of Student Achievement workshops
- Equitable counseling programs and techniques

Palau
- Assessing English proficiency and student placement
- General awareness for school personnel and parents of desegregation related issues

Guam
- Identification of bias in textbooks and other materials
- Equitable counseling techniques
- Equitable disciplinary procedures
- Development of programs for LEP students

> Yet, OCR in San Francisco reports that only two (2) Title IX and four (4) Title VI complaints were filed in the last three-and-a- half years and all six (6) complaints were filed against the Hawaii Department of Education. Not a single complaint originated in either Samoa, the Trust Territories, Northern Marianas, Palau or Guam. During the same time period, one (1) compliance review was conducted in Hawaii.

The remarkably few number of complaints filed and violations found in Regions IX and X suggest one of a number, or combination, of occurrences:

1) SEAs and LEAs have made great strides in correcting and improving equal educational opportunity concerns so that few, if any, protected group members believe they have been discriminated against and sought relief through the Office of Civil Rights.

2) OCR's monitoring activities have resulted in improved conditions throughout the regions.

3) Aggrieved persons may have sought relief through state or local antidiscrimination laws.

4) OCR persuaded complainants to withdraw complaints or engaged in other serious infractions noted in the Committee on Government Operations Report, "Failure and Fraud..." (see pages 8 and 9 herein).

5) "[One] factor that leads state and local education officials to resist data collection efforts or provide low-quality responses is the desire to avoid enforcement actions or embarrassment." (Rand Corporation - Politics of Educational Data Collections - P. T. Hill)

6) Individuals were disciminated against, did not realize it and, therefore, never sought enforcement of laws designed to protect their right to equal educational opportunities.

Whatever the reasons are, there is strong evidence that all of the above have contributed, in varying degress, to the relative inactivity in the number of complaints filed and violations found in the regions.

With this in mind, the following areas should serve as the minimum focal points for continued training and technical assistance activities in DAC Region J:

Title IX - Sex Equity

1) School Personnel Understanding - The development of programs to increase the understanding of public school personnel concerning the problem of sex bias in education and to avoid this bias in their work.

2) Problem Resolution - The identification and resolution of educational problems that have arisen, or that may arise, in meeting the requirements of Title IX (and, in connection with that activity, of state laws prohibiting discrimination on the basis of sex in education).

3) Parent/Student Identification - The preparation and dissemination to parents and students of materials explaining the requirements of federal and state laws.

4) Staff Recruitment - The requirements of women and men for employment in public schools in positions in which they are underrepresented.

5) Employment Practices - The development of procedures for preventing discrimination on the basis of sex in public school employment practices such as hiring, assignment, promotion, transfer, termination, and payment.

6) Resource Identification - The identification of federal, state and other resources that would assist in sex desegregation, except that the recipient may not assist in the preparation of applications for financial assistance.

Title VI - Race/National Origin

1) Problem Resolution - The identification of educational problems that have arisen, or may arise, from the implementation of a race desegregation plan or in meeting the requirements of Title VI relating to discrimination on the basis of national origin.

2) Community Support - The development of methods of encouraging students, parent and community support for, and involvement in, the race desegregation process.

3) Staff Recruitment - The requirements of women and men for employment in public schools in positions in which they are underrepresented.

4) Employment Practices - The development of procedures for preventing discrimination on the basis of race/national origin in public school employment practices such as hiring, assignment, promotion, transfer, termination, and payment.

5) Student Assignments - The development of procedures to prevent student assignments within public schools (including assignments to ability groups) that discriminate on the basis of race/national origin.

6) Disciplinary Procedures - The development of disciplinary procedures that do not discriminate on the basis of race/national origin.

7) Civil Rights Related Requirements - Meeting other civil rights related requirements of the Emergency School Aid Act.

8) Student Participation - The development of methods of encouraging the participation of students of all races in school activities.

9) Human Relations - The development of human relations activities designed to facilitate racial harmony in public schools.

10) Parent/Student Communication - The preparation and dissemination of material explaining the requirements of federal and state laws to parents and students in their dominant language.

11) Bias in Curriculum Material - The identification of stereotypes in textbooks and other curricular material and the development of methods of countering their effects on students.

12) Language Assessment - The development of procedures to identify students whose dominant language is not English and to assess their English language proficiency (and before placement in special education classes.)

13) Resource Identification - The identification of federal, state and other resources that would assist in race/national origin desegregation, except that the recipient may not assist in the preparation of applications for financial assistance.

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[1] On October 19, 1970, the NAACP Legal Defense and Education Fund filed suit alleging six different causes of action charging the Department of Health, Education and Welfare (HEW) with refusing to take action against school districts under court order requiring desegregation; refusing to enforce Title VI against higher education systems; refusing to initiate enforcement proceedings against school districts that had reneged on existing desegregation plans; refusing to terminate Federal funds to school districts that had been the subject of enforcement proceedings for more than two years; and refusing to abide by Supreme Court decisions in evaluating desegregation plans. (Adams v. Richardson)

APPENDIX A

SAN FRANCISCO-OCR/DOE

APPENDIX A

SAN FRANCISCO-OCR/DOE

Elementary/Secondary

I. A. Recipient: Hawaii - Department of Education
B. Date: May 29, 1984
C. General Basis: Asian/Pacific Islander and Sex
D. Employee Type: Administrative and Managerial Staff
E. Issue(s): (1) Discriminatory policies, practices or procedures related to the process of identifying and attempting to persuade persons to apply for employment; recruitment practices that have the effect of giving preferential treatment to nonprotected group members or result in disproportionate employment of comparison groups.
(2) Tests, standards, rules or eligibility requirements that must be met in order for a person to be considered for employment. Examples: Past experience or training, test scores, recommendations.
(3) Opportunities to pursue training or other methods of job-related development. Examples: Payment of tuition, leaves of absence or sabbaticals.
F. Finding(s): No violation.

II. A. Recipient: Hawaii - Department of Education
B. Date: February 29, 1984
C. General Basis: Asian/Pacific Islander
D. Employee Type: Instructional Personnel for students whose Primary or Home Language is Other Than English (PHLOTE)
E. Issue(s): (1) Patterns and practices for assignment of staff to schools, institutions, programs, classes and educational activities in a manner that perpetuates racial or ethnic identity.
(2) The provision of comparable qualified staff to each school, institution, program and class. Examples: Qualifications of bilingual instructional personnel, teacher certification, in-service training of staff.

II. E. Issue(s): (continued)

(3) Tests, standards, rules or eligibility requirements that must be met in order for a person to be considered for employment. Examples: Test scores, past experience or training.

(4) The manner in which selection criteria are considered and employment selections made. Examples: Rating of applications, composition of decision-making committee, numerical limits or quotas.

(5) Failure to identify and provide adequate instruction for limited English proficient students (LEPS) through the language they can understand best, as well as effective instruction in English until students are able to function effectively in regular programs; discriminatory treatment of such students.

(6) The process and procedures by which a recipient assesses the degree of linguistic function or ability (language proficiency in both English and the native language) of each student so as to place the student in a category by language proficiency. Examples: Relative language proficiency tests, structured bilingual interviews.

(7) The procedures used to identify the nature and extent of each student's educational needs and to prescribe and implement an appropriate education program that will satisfy the diagnosed educational needs.

(8) Criteria by which students are exited (transferred to the regular education program) from a transitional bilingual educaton program.

F. Finding(s): Violation found and a corrective action plan adopted and being monitored.

III. A. Recipient: Hawaii - Department of Education
B. Date: April 24, 1984
C. General Basis: National Origin
D. Employee Type: Student/Class Action
E. Issue(s): (1) The process or procedures by which a recipient identifies each student's primary or home language. Examples: Home visits, teacher observation.

III. E. Issue(s): (continued)
(2) The process and procedures by which a recipient assesses the degree of linguistic function or ability (language proficiency in both English and the native language) of each student so as to place the student in a category by language proficiency. Examples: Relative language proficiency tests, structured bilingual interviews.
(3) The procedures used to identify the nature and extent of each student's educational needs and to prescribe and implement an appropriate education program that will satisfy the diagnosed educational needs.
(4) Criteria by which students are exited (transferred to the regular education program) from a transitional bilingual education program.
(5) Other PHLOTE issue.
F. Finding(s): Violation found and corrective action plan adopted and being monitored.

IV. A. Recipient: Hawaii - Department of Education
B. Date: May 29, 1984
C. General Basis: Asian/Pacific Islander
D. Employee Type: Administrative and Managerial Staff
E. Issue(s): Intimidation, coercion, or threatening of an employee because he/she has made a complaint, testified or participated in an investigation or proceeding in relationship to alleged discrimination by the recipient.
F. Finding(s): No violation.

V. A. Recipient: Hawaii - Department of Education
B. Date: March 7, 1985
C. General Basis: Race/Non-Minority White
D. Employee Type: Student
E. Issue(s): (1) Failure to ensure that student/beneficiaries are afforded their rights to equal treatment in a nondiscriminatory manner and are not subjected to retaliation for making or assisting in a discrimination complaint.
(2) The intimidation, coercion or threatening of a student/beneficiary because he/she has made a complaint, assisted or participated in an investigation or hearing in relationship to alleged discrimination by the recipient.

V. E. Issue(s): (continued)
(3) The subjecting of student/beneficiaries to improper conduct that is a term of receiving services or benefits; improper or intimidating conduct that substantially interferes with the equitable delivery of services or benefits. Examples: Sexual harrassment, racist or sexual remarks made by an instructor in the classroom.
F. Finding(s): No violation.

VI. A. Recipient: Hawaii - Department of Education
B. Date: July 9, 1985
C. General Basis: Asian/Pacific Island, Non-Minority White, Male (reverse discrimination)
D. Employee Type:
E. Issue(s): (1) Policies, standards and requirements that must be met in order for a student/beneficiary to be considered for an award, honor or prize. Examples: Teacher recommendations, special talents or abilities.
(2) The manner in which selection of student beneficiaries for awards and honors are made. Examples: Composition of decision-making committee, rating of candidates.
(3) Procedures for ensuring that the overall distribution of awards and honors does not have a discriminatory effect or disproportionate impact on protected group members.
F. Finding(s): No violation.

APPENDIX B

SEATTLE OCR/DOE - TITLE IX

APPENDIX B

SEATTLE-OCR/DOE - TITLE IX

Elementary/Secondary

I. A. Recipient: East Valley School District #361
B. Date: December 31, 1984
C. General Basis: Sex
D. Employee Type: Student/Staff
E. Issue(s): (1) Athletics - failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.
(2) Equivalent assignment and compensation of coaching staff. Examples: Salary, fringe benefits, leave, training, duration of contract.
(3) The provision of equal opportunity to receive coaching benefits and services in overall athletic program. Examples: Participation/coach ratio.
F. Finding(s): Complaint not timely.

II. A. Recipient: Salem School District 24J
B. Date: December 31, 1984
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): Discriminatory policies, practices, procedures or standards used to measure academic performance or achievement; or that have a disproportionate impact on protected group members; failure to ensure that students/beneficiaries are afforded their rights to equal treatment in a non-discriminatory manner and are not subjected to retaliation for making or assisting in a discrimination complaint.
F. Finding(s): Complaint patently frivolous.

III. A. Recipient: Tacoma School District #10
B. Date: January 30, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): (1) Provision of the necessary athletic equipment, supplies and facilities for all students. Examples: Uniforms, instructional devices, practice and competitive facilities.
(2) Scheduling of games and practice times. Examples: Number of competitive events, time of day events and practices are scheduled, pre and post-season competition.
(3) Provision of equivalent opportunity to travel and equivalent per diem allowances. Examples: Modes of transportation, housing furnished during travel, dining arrangements.
(4) Equivalent provision of publications and other promotional devices, sports information personnel and access to other publicity resources. Examples: Provision of cheerleading.
F. Finding(s): Unknown.

IV. A. Recipient: Mercer Island School District #400
B. Date: February 20, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): Athletics - failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.
F. Finding(s): Complaint withdrawn, complainant achieves results.

V. A. Recipient: Bellevue School District #405
B. Date: February 20, 1985
C. General Basis: Sex
D. Employee Type: Student

V. E. Issue(s): Athletics - failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.
F. Finding(s): Complaint withdrawn, complainant achieves results.

VI. A. Recipient: Lake Washington School District
B. Date: February 20, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): Athletics - failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.
F. Finding(s): Complaint withdrawn, complainant achieves results.

VII. A. Recipient: Northshore School District #417
B. Date: February 20, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): Athletics - failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide

VII. E. Issue(s): (continued) reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.

F. Finding(s): Complaint withdrawn, complainant achieves results.

VIII. A. Recipient: Issaquah School District #411

B. Date: February 20, 1985

C. General Basis: Sex

D. Employee Type: Student

E. Issue(s): Athletics - failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.

F. Finding(s): Complaint withdrawn, complainant achieves results.

IX. A. Recipient: Eastside Catholic High School

B. Date: February 20, 1985

C. General Basis: Sex

D. Employee Type: Student

E. Issue(s): Athletics - failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.

F. Finding(s): Complaint withdrawn, complainant achieves results.

X. A. Recipient: Tacoma School District #10
B. Date: March 27, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): (1) Provision of necessary athletic equipment, supplies and facilities for all students. Examples: Uniforms, sports-specific equipment and supplies, locker rooms.
(2) Scheduling of games and practice sessions. Examples: Number of competitive events, number and length of practice opportunities.
(3) Provision of equivalent opportunity to travel and equivalent per diem allowances. Examples: Modes of transportation, length of stay.
(4) Equivalent provision of publications and other promotional devices, sports information personnel and access to other publicity resources. Examples: Provision of cheerleading.
F. Finding(s): Complaint withdrawn, complainant achieves results.

XI. A. Recipient: Wellpinit School District
B. Date: April 15, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): (1) Failure to accommodate effectively the interests and abilities of students and to ensure that equal opportunity for protected group members exists in all aspects of intercollegiate, interscholastic and intramural sports competition and programs; failure to provide reasonable and proportional opportunities for obtaining athletic financial assistance; provision of special services for student athletes in a manner that adversely impacts on the opportunities provided to protected group members.
(2) Other athletic issues.
F. Finding(s): Investigation found no violation.

XII. A. Recipient: Renton School District
B. Date: June 4, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): (1) Failure to provide or keep information required by Title IX regulations, failure to maintain confidentiality of records.
(2) Failure to adopt, implement or adhere to administrative procedures required by regulations enforced by OCR.
(3) The adoption, publication and continuing implementation of grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging discriminatory action. Examples: Opportunity for hearing, notice of opportunity for parental participation, review procedures.
F. Finding(s): Violation corrected, remedial action completed.

XIII. A. Recipient: Federal Way School District
B. Date: June 17, 1985
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): (1) Policies, practices or procedures regarding the hiring of employees that result in the exclusion of protected group members; discriminatory practices that result in identifiable patterns of employment regarding comparison groups; hiring practices that have a discriminatory effect or disproportionate impact on protected group members.
(2) Discriminatory policies, practices or procedures related to the process of identifying and attempting to persuade persons to apply for employment; recruitment practices that have the effect of giving preferential treatment to nonprotected group members or result in disproportionate employment of comparison groups.
(3) Practices and procedures used in attempting to persuade persons to apply for employment with an education program or institution and the treatment afforded prospective employees. Examples: Recruitment team composition, assigned roles of recruitment team.

XIII. E. Issue(s): (continued)
(4) Discriminatory policies, practices or procedures regarding the review of applicants and the determination or selection of those persons to be hired; selection policies or practices that have the effect of excluding protected group members, have a discriminatory impact on protected groups or result in disproportionate employment of comparison groups.
(5) Tests, standards, rules or eligibility requirements that must be met in order for a person to be considered for employment. Examples: Past experience or training, test scores, recommendations.
(6) Discriminatory policies or practices that result in the disproportionate demotion, discipline and/or dismissal of comparison groups; demotion, dismissal and/or discipline policies or practices that have a discriminatory effect on protected group members. Examples: Layoffs, position downgrading, probation.
(7) Failure to ensure that employees are afforded their rights to equal treatment in a nondiscriminatory manner and are not subjected to retaliation for making or assisting in a discrimination complaint.
(8) Other employee demotion, dismissal or disciplinary issue.

F. Finding(s): OCR has jurisdiction, but another agency will process.

XIV. A. Recipient: Shelton School District #309
B. Date: October 20, 1986
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): (1) Policies, standards, rules or requirements regarding participation in student organizations and activities.
(2) The manner in which selection of students for memebership or participation in extracurricular organizations and activities is made. Examples: Numerical limits or quotas, composition of decision-making board.
F. Finding(s): Complaint not completed.

XV. A. Recipient: Enumclaw School District #216
B. Date: March 17, 1987
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): (1) Regulations, guidelines, standards or rules of behavior used to determine offensive conduct/behavior, infractions and violations for which students are punished. Examples: Appearance codes, separate or different rules of behavior for comparison groups.
(2) Subjecting of student/beneficiaries to improper conduct that is a term of receiving services or benefits, improper or intimidating conduct that substantially interfers with the equitable delivery of services or benefits. Examples: Sexual harrassment, racist or sexual remarks made by an instructor in the classroom, differential treatment of protected group members.
F. Finding(s): Complaint not completed.

XVI. A. Recipient: Oregon Department Of Education
B. Date: June 10, 1987
C. General Basis: Sex
D. Employee Type: Staff
E. Issue(s): Regulations, rules, behavioral codes and measures of performance that establish the standards which, if not met, are grounds for demotion, dismissal or discipline of employees; criteria used to determine employees to be dismissed when layoffs occur.
F. Finding(s): Complaint not timely.

XVII. A. Recipient: Puyallup School District
B. Date: November 16, 1987
C. General Basis: Sex
D. Employee Type: Student
E. Issue(s): The determination and effective accommodation of the athletic interests and abilities of students. Examples: Assessment/determination of athletic interests and abilities, levels of competition available, quality of participation opportunities.
F. Finding(s): Lack of jurisdiction.

APPENDIX C

SEATTLE-OCR/DOE - TITLE VI

APPENDIX C

SEATTLE-OCR/DOE - TITLE VI

Elementary/Secondary

I.

A. Recipient: North Slope Burough School District

B. Date: December 12, 1984

C. General Basis: Race/National Origin

D. Employee Type: Student/Staff

E. Issue(s): (1) The provision of staff for programs and educational activities in a manner that results in or perpetuates racial/ethnic identity of schools, programs or classes; failure to provide staff of comparable quality and/or comparable student/teacher ratios; staffing that results in discriminatory delivery of program services or has a disproportionate impact upon members of a protected class group.
(2) Policies, practices or procedures regarding the hiring of employees that result in the exclusion of protected group members; discriminatory practices that result in identifiable patterns of employment regarding comparison groups; hiring practices that have a discriminatory effect or disproportionate impact on protected group members.

F. Finding(s): No jurisdiction over the subject matter.

II.

A. Recipient: Seattle School District

B. Date: March 13, 1985

C. General Basis: Race/National Origin

D. Employee Type: Student

E. Issue(s): (1) Discriminatory policies, practices or procedures regarding the assignment of students/beneficiaries to schools or institutions; assignment practices that result in identifiable schools or have a discriminatory effect on protected group members.

II. E. Issue(s): (continued)
(2) Policies, practices or procedures that result in provisions of inequitable transportation services; provision of transportation services in a manner that has a discriminatory effect or disproportionate impact on protected group students.

F. Finding(s): Complaint not timely.

III. A. Recipient: Hydaburg City School District

B. Date: March 29, 1985

C. General Basis: Race/National Origin

D. Employee Type: Student

E. Issue(s): (1) Failure to ensure that student/beneficiaries are afforded their rights to equal treatment in a nondiscriminatory manner and are not subjected to retaliation for making or assisting in a discrimination complaint.
(2) The subjecting of student/beneficiaries to improper conduct that is a term of receiving services or benefits; improper or intimidating conduct that substantially interfers with the equitable delivery of services or benefits. Examples: Sexual harrassment, racist or sexist remarks made by an instructor in the classroom, different treatment of protected group members.

F. Finding(s): Complaint not completed.

IV. A. Recipient: Seattle School District #1

B. Date: August 22, 1985

C. General Basis: Race/National Origin

D. Employee Type: Student

E. Issue(s): (1) The process used to locate student/beneficiaries with demonstrated achievement and/or potential abilities who require differentiated educational programs. Examples: Teacher recommendation, test scores.
(2) Standards and procedures used to evaluate the achievement or potential of gifted and talented students/beneficiaries (after the preliminary identification has been made).

IV. E. Issue(s): (continued)
(3) The assignment of students diagnosed as having outstanding abilities to differentiated programs designed to meet their education needs.
(4) Other assignment to programs for gifted and talented issue.

F. Finding(s): Remains open.

V. A. Recipient: Wrangell Public School District

B. Date: September 12, 1985

C. General Basis: Race/National Origin

D. Employee Type: Employee/Staff

E. Issue(s): (1) Policies, practices or procedures regarding the hiring of employees that result in the exclusion of protected group members; discriminatory practices that result in identifiable patterns of employment regarding comparison groups; hiring practices that have a discriminatory effect or disproportionate impact on protected group members.
(2) Discriminatory policies, practices or procedures regarding application for employment with an education institution or program; processing of applications in a manner that has a discriminatory effect on protected group members; any application requirement that has the effect of excluding or dissuading protected group members from applying for employment or that results in disproportionate employment of comparison groups.
(3) Discriminatory policies, practices or procedures regarding the review of applicants and the determination or selection of those persons to be hired; selection policies or practices that have the effect of excluding protected group members, have a discriminatory impact on protected group members or result in disproportionate employment of comparison groups.
(4) The manner in which selection criteria are considered and employment selections are made. Examples: Rating of applications, interview ratings, numerical limits or quotas, consideration of personal questions asked during interviews.

F. Finding(s): Complaint not completed.

VI.	A.	Recipient:	Fairbanks North Star Borough
	B.	Date:	September 25, 1985
	C.	General Basis:	Race/National Origin
	D.	Employee Type:	Student
	E.	Issue(s):	(1) Practices, policies or procedures regarding the assignment or placement of students/beneficiaries which result in discriminatory identification, evaluation and/or placement of protected group students entitled to special programs of institution; or disproportionate impact or discriminatory effect of assignment practices on protected group students. (2) Policies, practices and procedures regarding the assignment of students within schools or programs; assignment practices that result in identifiable classes or have a discriminatory effect or disproportionate impact on protected group members. (3) Standards, rules, principles and measures used to determine the classes to which students are assigned. Examples: Sex separate physical education or vocational education classes. (4) The practice of grouping students within grade levels as programs according to their estimated capacity to learn or perform.
	F.	Finding(s):	Complaint withdrawn without benefit to complainant.

VII.	A.	Recipient:	Wapato School District
	B.	Date:	
	C.	General Basis:	Race/National Origin
	D.	Employee Type:	Student
	E.	Issue(s):	(1) Regulations, guides, standards or rules of behavior used to determine offensive conduct/behavior, infractions and violations for which students are punished. Examples: Appearance codes, separate or different rules of behavior for comparison groups. (2) Physical punishment as a method of discipline; punishment inflicted directly on the body.

VII. E. Issue(s): (continued)
(3) The temporary barring or exclusion of students from an education program or institution as a method of discipline; interruption of program participation due to disciplinary infractions. Examples: Comparability of length of suspension, disproportionate suspension rates.
(4) Permanent dismissal or exclusion of students from an education program as a method of discipline; cessation of program participation due to disciplinary infractions. Examples: Disproportionate expulsion rates.
F. Finding(s): Investigation found no violation.

VIII. A. Recipient: Alaska Department of Education
B. Date: December 31, 1985
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): The methods established for the allocation of Federal, State or local education funds; distribution of funds in a manner that provides equal opportunity and access to services and benefits of education programs or activities by all student/beneficiaries. Examples: Funding formulas.
F. Finding(s): Investigation found no violation.

IX. A. Recipient: Seattle School District
B. Date: January 31, 1986
C. General Basis: Race/National Origin
D. Employee Type: None listed
E. Issue(s): None listed
F. Finding(s): Complaint not completed.

X. A. Recipient: Tacoma Public School - Bilingual Program

B. Date: March 5, 1986

C. General Basis: Race/National Origin

D. Employee Type: Employee/Staff

E. Issue(s): (1) Discriminatory policies, practices or procedures regarding application for employment with an educational institution or program; processing of applications in a manner that has a discriminatory effect on protected group members; any application requirement that has the effect of excluding or dissuading protected group members from applying for employment or that results in disproportionate employment of comparison groups.

(2) Forms that must be submitted and information supplied as part of the application process. Examples: Preadmission inquiries about health or family status.

(3) A series of actions, starting with receipt of an application, that lead to consideration for employment; the treatment afforded application forms and all supplemental information.

(4) Discriminatory policies, practices or procedures regarding the review of applications and the determination or selection of those persons to be hired; selection policies or practices that have the effect of excluding protected group members, have a discriminatory impact on protected groups or result in disproportionate employment of comparison groups.

(5) Tests, standards, rules or eligibility requirements that must be met in order for a person to be considered for employment. Examples: Past experience or training, test scores, recommendations.

(6) The manner in which selection criteria are considered and employment selections are made. Examples: Rating of applications, composition of decision-making board, consideration of personal questions asked during interviews.

F. Finding(s): No jurisdiction over subject matter.

XI. A. Recipient: Walla Walla School District
B. Date: April 9, 1986
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): (1) Policies, practices or procedures that result in the inequitable or inaccessible provision of services that are not part of the academic curriculum or program services, but support and/or contribute to them; provision of such services in a manner that has a discriminatory effect on protected group members or results in disproportionate participation of comparison groups.
(2) Discriminatory policies, practices or procedures in the awarding of all forms of financial assistance designed to help sutdents finance enrollment or associated costs in academic programs; policies or practices that result in unequal distribution of financial assistance among comparison groups. Examples: Scholarships, grants-in-aid, loans, waivers.
F. Finding(s): Complaint not completed.

XII. A. Recipient: Grandview School District
B. Date: May 13, 1986
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): (1) Physical punishment as a method of discipline; punishment inflicted directly on the body.
(2) Other discipline issue.
F. Finding(s): Investigation found no violation.

XIII. A. Recipient: Fairbanks North Star Borough School District
B. Date: June 9, 1986
C. General Basis: Race/National Origin
D. Employee Type: Employee/Staff
E. Issue(s): (1) Tests, standards, rules or eligibility requirements that must be met in order for a person to be considered for employment. Examples: Past experience or training, test scores, recommendations.
(2) The manner in which selection criteria are considered and employment selections are made. Examples: Rating of applicants, interview ratings, numerical limits or quotas.
F. Finding(s): Complaint withdrawn, complainant achieves results desired.

XIV. A. Recipient: Seattle School District
B. Date: July 15, 1986
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): Failure to ensure that administrative policies, practices and procedures that are essential to the provision of equal education opportunity are provided in accordance with regulatory requirements and do not result in discriminatory effect or disproportionate impact on protected group members. This includes the policies, practices and procedures of state agency recipients.
F. Finding(s): Complaint not completed.

XV. A. Recipient: Grandview School District
B. Date: July 25, 1986
C. General Basis: Race/National Origin
D. Employee Type: Employee/Staff
E. Issue(s): (1) Policies, practices or procedures regarding the hiring of employees that result in the exclusion of protected group members; discriminatory practices that result in identifiable patterns of employment regarding comparison groups; hiring practices that have a discriminatory effect or disproportionate impact on protected group members.

XV. E. Issue(s): (continued)

(2) Discriminatory policies, practices or procedures related to the process of identifying and attempting to persuade persons to apply for employment; recruitment practices that have the effect of giving preferential treatment to nonprotected group members or result in disproportionate employment of comparison groups.

(3) Practices and procedures used in attempting to persuade persons to apply for employment with an education program or institution; and the treatment afforded prospective employees. Examples: Recruitment team composition, assigned roles of recruitment team.

(4) Policies, practices or procedures that result in the delivery of program services in a manner that, when viewed in its entirety, is inequitable or inaccessible; program services that have a discriminatory effect or disproportionate impact on protected group students.

(5) The provision of staff for programs and educational activities in a manner that results in or perpetuates the racial, sexual or ethnic identity of schools, programs or classes; failure to provide staff of comparable quality and/or comparable student/teacher ratios; staffing that results in discriminatory delivery of program services or has a disproportionate impact upon members of a protected group.

(6) The provision of comparable numbers of teachers or instructors (as compared to the number of students) for each school, institution, program or class.

F. Finding(s): Complaint patently frivolous.

XVI. A. Recipient: North Slope Borough School District
B. Date: September 2, 1986
C. General Basis: Race/National Origin
D. Employee Type: Employee/Staff
E. Issue(s): (1) Failure to ensure that employees are afforded their rights to equal treatment in a nondiscriminatory manner and are not subjected to retaliation for making or assisting in a discrimination complaint. Does not include grievance procedures or due process rights.
(2) The intimidation, coersion or threatening of an employee because he or she has made a complaint, testified or participated in an investigation or proceeding in relationship to alleged discrimination by the recipient.
(3) The subjecting of an employee to improper conduct as a condition of receiving services or benefits; improper or intimidating conduct that substantially interfers with job performance. Examples: Sexual harrassment, differential treatment of comparison groups.
(4) Discriminatory policies or practices that result in the disproportionate demotion, discipline and/or dismissal of comparison groups; demotion, dismissal and/or discipline policies or practices that have a discriminatory effect on protected group members. Examples: Layoffs, position downgrading, probation.
F. Finding(s): OCR has jurisdiction, but another agency will process.

XVII. A. Recipient: Shelton School District #309
B. Date: October 20, 1986
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): (1) Policies, standards, rules or requirements regarding participation in student organizations and activities.
(2) The manner in which selection of students for membership or participation in extracurricular organizations and activities is made. Examples: Numerical limits or quotas, composition of decision-making board.
F. Finding(s): Complaint not completed.

XVIII. A. Recipient: Reynolds School District #7
B. Date: January 21, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): Physical punishment as a method of discipline; punishment inflicted directly on the body.
F. Finding(s): Investigation found no violation.

XIX. A. Recipient: Enumclaw School District #216
B. Date: March 17, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): (1) Regulations, guides, standards or rules of behavior used to determine offensive conduct/behavior, infractions and violations for which students are punished. Examples: Appearance codes, subjective definitions of offensive conduct/behavior.
(2) The subjecting of student/beneficiaries to improper conduct that is a term of receiving services or benefits; improper or intimidating conduct that substantially interfers with the equitable delivery of services or benefits. Examples: Racist or sexist remarks made by an instructor in the classroom, different treatment of protected group members.
F. Finding(s): Complaint not completed.

XX. A. Recipient: Seattle School District #1
B. Date: April 7, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): (1) Regulations, guides, standards or rules of behavior used to determine offensive conduct/behavior; infractions and violations for which students are punished. Examples: Separate or different rules of behavior for comparison groups, subjective definitions of offensive conduct/behavior.
(2) Other assignment to program for gifted and talented issue.

XX.	E.	Issue(s):	(continued) (3) The adoption, publication and continuing implementation of grievance procedures that incorporate appropriate due process standards and provide for the prompt and equitable resolution of complaints alleging discriminatory action; the establishment of procedural, due process safeguards with respect to identification, notification evaluation and placement of handicapped persons at the elementary and secondary level. Examples: Due process procedures in the administration of discipline, opportunity for hearing, third party representation/representation by counsel, review procedures.
	F.	Finding(s):	Investigation found no violation.
XXI.	A.	Recipient:	Marysville School District
	B.	Date:	April 8, 1987
	C.	General Basis:	Race/National Origin
	D.	Employee Type:	Student
	E.	Issue(s):	(1) The subjecting of student/beneficiaries to improper conduct that is a term of receiving services or benefits; improper or intimidating conduct that substantially interfers with the equitable delivery of services or benefits. Examples: Racist or sexist remarks made by an instructor in the classroom, differential treatment of protected group members. (2) Other student rights issue.
	F.	Finding(s):	Investigation found no violation.
XXII.	A.	Recipient:	Seattle School District #1
	B.	Date:	May 22, 1987
	C.	General Basis:	Race/National Origin
	D.	Employee Type:	Student
	E.	Issue(s):	(1) The temporary barring or exclusion of students from an education program or institution as a method of discipline; interruption of program participation due to disciplinary infraction. Examples: Comparability of length of suspension, disproportionate suspension rates.

XXII. E. Issue(s): (continued)
(2) The intimidation, coersion or threatening of a student/beneficiary because he or she has made a complaint, assisted or participated in an investigation or hearing in relationship to alleged discrimination by the recipient.
(3) The subjecting of student/beneficiaries to improper conduct that in term of receiving services benefits; improper or intimidating conduct that substantially interfers with the equitable delivery of services or benefits. Examples: Racist or sexist remarks made by an instructor in the classroom, differential treatment of protected group members.
F. Finding(s): Investigation found no violation.

XXIII. A. Recipient: Seattle School District #1
B. Date: June 15, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): Pattern and practices for assignment of staff to schools, institutions, programs, classes and educational activities in a manner that perpetuates racial or ethnic identity.
F. Findings(s): No jurisdiction over subject matter.

XXIV. A. Recipient: Moses Lake School District #161
B. Date: July 29, 1987
C. General Basis: Race/National Origin
D. Employee Type: Employee/Staff
E. Issue(s): Tests, standards, rules or eligibility requirements that must be met in order for a person to be considered for employment. Examples: Past experience or training, test scores, recommendations.
F. Finding(s): OCR has jurisdiction, but another agency will process.

XXV: A. Recipient: Salem/Keizer School District
B. Date: August 26, 1987
C. General Basis: Race/National Origin
D. Employee Type: Employee/Staff
E. Issue(s): (1) Forms that must be submitted and information that must be supplied as part of the application process. Examples: Preadmission inquiries about health or family status.
(2) Other employee evaluation or treatment issue.
F. Finding(s): OCR has jurisdiction, but another agency will process.

XXVI. A. Recipient: Tacoma School District #10
B. Date: September 15, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): Procedures used to identify the nature and extent of each student's educational needs and to prescribe and implement an appropriate education program that will satisfy the diagnosed educational needs.
F. Finding(s): Remains open.

XXVII. A. Recipient: Seattle School District
B. Date: September 24, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): Intimidation, coersion or threatening of a student/beneficiary because he/she has made a complaint, assisted or participated in an investigation or hearing in relationship to alleged discrimination by the recipient.
F. Finding(s): Remains open.

XXVIII. A. Recipient: Tacoma School District
B. Date: October 9, 1987
C. General Basis: Race/National Origin
D. Employee Type: Employee/Staff
E. Issue(s): Practices and procedures used in attempting to persuade persons to apply for employment with an education program or institution and the treatment afforded prospective employees. Examples: Recruitment team composition, assigned roles of recruitment team.
F. Finding(s): OCR has jurisdiction, but another agency will process.

XXIX: A. Recipient: Bremerton School District #100-C
B. Date: April 3, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student/Staff
E. Issue(s): (1) Tests, standards or rules that must be met in order for a person to be considered for selection. Examples: Residency requirements, financial status, grade point average, course work prerequisites.
(2) The manner in which selection criteria are considered and employment selections are made. Examples: Rating of applications, interview ratings, consideration of personal questions asked during interviews.
F. Finding(s): No jurisdiction over the institution.

XXX. A. Recipient: Seattle School District
B. Date: December 4, 1987
C. General Basis: Race/National Origin
D. Employee Type: Student
E. Issue(s): (1) Procedures for interpreting evaluation data and making decisions as to the placement or referral of persons diagnosed as having physical or mental impairments. Examples: Procedures to ensure that information used is documented and carefully considered by an appropriate decision-making group, overinclusion of protected group students.
(2) Policies and procedures for providing individual academic instruction designed to help students with courses in which they are experiencing difficulty; procedures for obtaining tutoring services; the manner in which tutoring services are provided.
F. Finding(s): Remains open.

APPENDIX D

OCR ELEMENTARY/SECONDARY/POST SECONDARY NATIONAL ENFORCEMENT ACTIVITIES

APPENDIX D

OCR ELEMENTARY/SECONDARY/POST SECONDARY
NATIONAL ENFORCEMENT ACTIVITIES

	Complaints Received	Complaints Closed	Compliance Reviews Initiated	Compliance Reviews Closed
1987	1,971	2,197	276	276
1986	2,649*	2,796**	196	208
1985	2,240	2,045	289	301
1984	1,934	1,966	220	224
1983	1,946	2,264	287	281

* 515 brought by single complainant
** 641 involved single complainant

The following information concerns the reasons why complaints and compliance reviews were closed:

COMPLAINTS

	Administrative Closure*	No Violation	Corrective Action Secured	Administrative Enforcement	Referred To Justice Department
1987	1,052	534	611	3	4
1986	1,349	494	945	9	0
1985	776	610	654	20	0
1984	729	578	639	22	3
1983	877	613	618	2	17

COMPLIANCE REVIEWS

1987	3	67	206
1986	5	59	145
1985	5	82	214
1984	2	60	159
1983	3	82	196

* Administrative Closure could be based on any of 17 reasons, examples of which include: no jurisdiction over the institution, complaint not timely, complainant cannot be located, complaint patently frivolous or complaint not completed

Mr. Orfield. My name is Gary Orfield. I am a professor of Political Science at the University of Chicago. I have been directing a study of changing patterns of opportunity for minority students in the United States, particularly focusing on a number of our large metropolitan areas, including Chicago and Los Angeles.

I have prepared a long statement for the committee, but I would like to summarize it, some of the main points briefly.

First of all, I think the most important thing for us to keep in mind is that American society is changing. Our population is becoming less white and more minority. The number of white students in public schools declined by one-sixth between 1968 and 1986.

The number of blacks increased by one-twentieth. The number of Hispanics doubled. The society is changing.

The growth sectors in our society are the groups most disadvantaged in the educational institutions. We have made no progress in school desegregation since 1972. We have very clear evidence segregated schools remain today and that they are one of the causes for what I will be talking about, which is a declining access of minority students to higher education and to the job market.

There has been a large increase in the number of jobs that need higher education and advanced training in our society. There has been, in this decade, a very substantial decline in access to higher education by the growing sectors of our population, particularly young blacks and Hispanics and most particularly young black and Hispanic males.

At the same time this decrease in minority access has been going on, we have had almost no significant activity on that issue by the Federal Government and the Office for Civil Rights. As far as elementary and secondary education goes, the Federal Government has become the principal enemy of school desegregation activities in the United States and advocated a massive dismantling of school desegregation all over the country, announcing the problem has been solved.

We have policies being adopted by many State and local governments and school districts, colleges and so forth, that are limiting minority access. They are not being held accountable by the Federal Government for the violations of the Title VI for the 1964 Civil Rights Act that may be caused by those policy changes.

Changes that have the foreseeable effect of limiting access to college and limiting the possibility of completing college, for example. This declining opportunity that we have in our higher education system directly threatens black and Hispanic communities in the United States and is devastating the future, particularly of minority men, of course, and of families that they would form.

The gains of the previous 25 years and access to higher education were largely lost by the middle of the eighties as a result not just of the lack of civil rights enforcement but also of the changes in the financial aid programs and other kinds of policies that took place in the eighties as well as the changes in the policies of State governments and colleges and universities which made those colleges accessible and less supportive for minority students.

Civil rights enforcement, in our judgment, was one of the key elements that permitted a tremendous increase in opportunity in higher education between the middle sixties and the middle seventies, when access to college for minority students reached its peak. We believe that the dismantling of that enforcement process is one of the key elements that led to the dismantling of opportunity for young black and Hispanic students in the United States.

As part of our project, after we identified the declining access to college and the declining completion rates in each of the metropolitan areas we studied around the country, part of our project was to find out what was going on in civil rights enforcement.

We began to visit the regional offices of the Office for Civil Rights and ask why these patterns were occurring, including several States that were under court order to increase minority access, and what the Federal Government was doing about it.

After the Washington office of the OCR found out we were doing that, they shut off our access to any more regional offices for employees to speak to us, refused to answer Freedom of Information requests, and generally speaking, intimidated employees and ordered that those who made appointments to speak with us and cancel their appointments.

What we found in the offices we did visit was a deeply demoralized staff that was being terrorized by very strong opponents of civil rights who were running the civil rights issues in the Education Department throughout the Reagan Administration, particularly in its final years.

People who believed that they were under extremely rigid constraints who had spent years of work trying to find out about civil rights violations, who believed very much in enforcement of the law, who sent tremendously well-documented evidence to Washington—we will find they were never acted on or the Washington officials giving full approval to the agency that had the pattern of documented failure to meet its own promises on a plan submitted to a Federal court.

The record shows, in our judgment, systematic non-enforcement, massive assaults of political appointees, deep demoralization of an agency, we found that by the end of the Reagan Administration procedural trivia had almost totally displaced substantive enforcement of civil rights law.

People were being threatened with loss of their job if they didn't process complaints within certain numbers of days, but they were never told to get any relief for the victims of the segregation. In fact, almost invariably in the large State plans, those plans that were obviously failing to meet the commitments and meet the goals and so forth were approved.

We found that there were consistent approval of activities of State Governments which were actually following policies that predictably limited minority access to college and minority success in completing college.

We found that college officials would have been willing to take positive steps if they were asked, but they were not even asked by the Federal Government.

In other words, the Federal Government was more conservative than the college leaders in the conservative States in the country and were basically telling them that nothing needed to be done, that whatever they did was okay and that if minority access dropped precipitously when it was supposed to be increasing, that was fine as long as they met certain formal requirements. Nobody cared how it came out. How it came out was judged to be irrelevant in evaluating performances of the States. They failed to ask colleges to even seriously examine why their minority enrollments were decreasing.

Outside of the States that were under court order, we found no serious investigations of the patterns of minority decline in access to college, which is occurring in all States.

In California, there are stunning declines happening and nothing had ever been done systematically by the Office for Civil Rights to look at the University of California system or the California State university system, or the failure of students to transfer from the minority community colleges into the higher level institutions.

There were general denunciations by leaders of the Administration, particularly in the Justice Department of the very idea of affirmative action or of measuring whether or not success was accomplished except in the case of Asian students.

In the case of Asian students, there was a very intense pressure brought to bear on universities that adopted admissions policies that led to a decline in Asian access to college.

There was no such pressure at all brought on by any of the colleges and university systems that adopted policies that had the completely foreseeable effect of limiting access to black and Hispanic students.

We found that there were decisions in the judgments of the State plans under Adams that would praise those who were going backwards and announce that they were in full compliance with the law when they had actually become significantly worse in terms of their minority enrollment and graduation levels.

We found no evidence of serious technical advice and no recognition from the civil rights officials and the rest of the Education Department of successful programs that should be models for the rest of the country.

All this was happening during a period when leadership of higher education in the country was increasingly concerned about these problems.

If you read the publications of the American Council on Education or the College Board or many of the other institutions, they recognize that they had a serious problem and that something needed to be done.

The Federal Government would come in response to that and say no, nothing needs to be done, you don't have to accomplish a positive change, it is all right if you adopt any policies you want that decreases access for underrepresented minorities as long as you don't say that openly in the policy statement.

What needs to be done if we are going to have a serious enforcement effort? These findings were found before the current Administration came into office and I hope that we will see changes on some of these fronts.

Let me tell you what I think some of the essential requirements are and I don't think any of these are in place yet in the Office for Civil Rights.

The Office for Civil Rights plays a vital role in setting the standards for activity on the rights of minority students. We need clear requirements.

Colleges have no idea what they are supposed to do to comply with Title VI of the 1964 Civil Rights Act. There are no clear standards or plans. Where there were plans under the court order, they have all almost now been accepted as fully complied with, even though the goals were not met in almost all cases. We need to tell colleges what they need to do, what we are expecting them to do in terms of analyzing their problems and developing plans to deal with them. College people understand that they have to have some kind of activity on this front, and the Federal Government is not giving them any leadership.

We need to have an effective data system which gives us indicators of when we are moving forward or backward. The Federal Government has never had the capacity to get timely data out about what is happening to either elementary and secondary or higher education systems. My research group waits for years for the data tapes from the Federal agencies to come out and we are now told that the higher education data for 1988 won't be available for a very long time. We just barely got the 1986 data. The 1988 elementary and secondary data isn't going to be ready until the middle of 1990 and funds have been taken from that. These agencies are running without information. This information should be on line and analyzed right away so we can find out what direction our society is moving. We need professional investigations monitoring and legal analysis.

This staff has been so demoralized and so decimated it is not a decent quality staff now. We have to rebuild it. We have to get higher education professionals involved in working with the colleges and universities.

Colleges and universities are very complicated decentralized organizations and you have to have people understand how they actually work and where decisions are actually made in them, et cetera.

I don't think that the OCR has had that capability to seriously talk colleague-to-colleague about these kinds of issues, but people who actually have the experience within the colleges, do understand what needs to be done.

We need high-quality technical assistance and dissemination of effective techniques.

In other words, there are a lot of colleges around the country with positive programs, some of which are working pretty well.

Instead of not doing anything, in addition to providing some policy guidance, we should spotlight some successful models and encourage other colleges to emulate them.

Learning from one campus to another would be more effective than trying to learn from a Federal bureaucracy.

We should have a policy staff that is capable of collecting and using data. There isn't one in the Office for Civil Rights. They really don't know how to get the kinds of compliance indicators that they need out of the data that they collected. Not only is it delayed so late that it is obsolete by the time anybody can use it, but they don't have capacity to use it to target the things that they need to focus on.

We need to have a strategy that focuses on big issues. Where there is a State or minority access to 30 or 40 percent in higher education, OCR should be looking at that asking for expansions and for some remedial action.

That is much more important than investigating 10 or 15 complaints, most of which will be dismissed in any case.

There is a need to change the time frames. The time frames don't exist in a court order now. We need to focus on these very large negative patterns. We need to get Federal grant funds to help design positive new approaches.

This is something I think the committee ought to do, to create a national competitive grant system. Colleges will bid for those kinds of things that will help them design and evaluate positive approaches for increasing minority access and retention.

Even when we had access in the seventies, we did not do a good job in retaining minority students and getting them graduated.

We have to use the Federal cutoff in litigation powers. We were talking about enforcement on difficult, complex issues which require difficult institutional changes that go against the grain of many institutions and there is no viable threat at all that anything bad will happen to these institutions if they don't take action. Without some kind of threat, this is not going to go anywhere near the top of the agenda. I can testify to that as one who knows many colleges.

The Justice Department strategy for enforcement and development of case law in higher education is vital and we need the Justice Department to stop trying to dismantle school desegregation plans all over the country and start dealing with some of the serious issues of city-suburban segregation, the role of State Governments, use of transfer programs and Choice in a positive way if it is going to be implemented, and issues of that sort. The Department of Justice should not use the power granted by the 1964 Civil Rights Act to threaten to destabilize existing desegregation plans all over the country.

We need to adopt systemic assessment procedures within the Education Department of other policy areas to look at their effect.

There is no question from our research that the financial aid policy changes have had an extremely negative effect on college going and completion of minority students.

There is very serious risk in my judgment that the Choice proposals and policies need to be assessed seriously from a civil rights perspective. That is one of the things that a good policy staff and OCR could do if it were on the job.

So I think that all the fundamentals for a good enforcement program aren't there. We need them badly because we are moving backwards on some of the most important issues for the future of our country.

I am encouraged that this committee is calling the officials to account and I hope that they will use their full range of powers to make sure that they listen and act on your concerns.

[The prepared statement of Gary Orfield follows:]

TESTIMONY OF PROFESSOR GARY ORFIELD, UNIVERSITY OF CHICAGO
DIRECTOR, METROPOLITAN OPPORTUNITY PROJECT
BEFORE THE HOUSE EDUCATION AND LABOR COMMITTEE, NOV. 28, 1989

During the past three years the Metropolitan Opportunity Project at the University of Chicago has been investigating the decline in educational and job training opportunities for young blacks and Hispanics in a number of the nation's largest metropolitan areas. After finding very clear evidence of declining access to college in all areas studied by our project we decided to study a number of possible causes of the decline. Two were federal civil rights enforcement and changes in federal financial aid policies. The study of the changes in federal civil rights enforcement is complete and a monograph reporting its findings will be published by the Joint Center for Political Studies in a few months. This testimony draws heavily on that report.

The basic finding is that minority access to college is seriously threatened and that there has been no significant enforcement of the 1964 Civil Rights Act's prohibitions against racial discrimination in the 1980s. Our study concluded that the Reagan Administration had systematically dismantled the enforcement process in spite of evidence of declining opportunity for blacks and Hispanics and of the willingness of the colleges to take some positive actions if required by the federal government. The report recommends a series of steps to rebuild the Office for Civil Rights staff and to create and enforce a policy that could help reverse the dangerous loss of potential college students and graduates that has occurred in the past decade.

The Decline. Minority access to higher education declined rapidly in the 1980s although the number and percent of blacks and Hispanics in the pool of high school graduates have grown and minority scores on college admission tests have risen. This happened both on a national scale and in each of five very different metropolitan areas studied by the Metropolitan Opportunity Project. Two decades ago there was a major national commitment to open the doors of higher education regardless of a student's race or income, a commitment that had a vast impact on minority college enrollment by the middle 1970s. Black enrollment and the integration of previously all-white institutions, were spurred by federal policies, adopted in the 1960s, assuring civil rights protection, expanding financial aid, and creating special recruitment and retention programs for minorities. Each of these policies has been slowed or reversed in the 1980s.

The remarkable increase in access of black high school graduates to college from the early 1960s to the mid-1970s was reversed in the 1980s. The level of access to college for new grads reached its peak in the late '70s. The 1980s brought a rapid decline.

In spite of small increases in recent data. When looking at the 18-24 year-old population of high school graduates, the percentage of white men and women enrolled in some college actually rose modestly between 1976 and 1986. In 1986 it was 35.7% for white men and 32.7% for white women. Among black graduates in the same group, however, there was a significant decline for both men and women. The male participation rate plummeted from its high of 35.4% to its 1986 level of 27.8%, while the female level fell more gradually, ending at 29.3% The drop in participation for Hispanic men was even more drastic, falling from 39.7% in 1976 to 29.0% a decade later. The pattern for Hispanic women showed a decline slightly larger than the decline for white women.

Table 1
Changes in College Enrollment Rates, 1976-1986
for High School Grads, 18-24 Years Old

year	percent enrolled in college					
	black		Hispanic		white	
	M	F	M	F	M	F
1976	35.4	32.0	39.7	33.1	35.4	30.7
1978	31.9	28.2	30.0	24.8	33.9	28.6
1980	26.4	28.8	31.0	28.8	34.0	30.2
1982	28.3	27.7	27.2	30.9	34.4	31.8
1984	28.9	26.0	28.1	31.3	36.4	31.1
1986	27.8	29.3	29.0	29.9	35.7	32.7
CHANGE	-7.6	-2.7	-10.7	-3.2	+.3	+2.0

Source: Census Current Population Survey data from American Council on Education, Minorities in Higher Education, 1988: 19-21.

Studies carried out for the Metropolitan Opportunity Project at the University of Chicago show serious declines in black and Hispanic college access for high school graduates in large metropolitan areas across the country. They also show even greater concentration of those minority students who do go to college in two-year rather than four-year colleges and even wider gaps than in the past between the proportion of white and minority students able to finish college and obtain degrees. Research shows a rapid decline in the training of minority teachers in many parts of the country. Studies by the National Academy of Sciences and other researchers show severe declines in the production of black Ph.D's, future college teachers, in a number of fields. The number of blacks receiving Ph.D.'s fell 32% between 1977 and 1987 and there was a stunning decline of 54% for black men.(Chronicle of Higher Education, March 1, 1989:

A-11). During the 1975-1985 period there was a decline in portion of the nation's full-time faculty who were black, a number that stood at 4.1% in 1985.(ACE, 1988:32). Examples of the wide disparities in college enrollment by race can be seen in the following tables on metropolitan Los Angeles:

Table 2
Enrollment at University of California Campuses in Metro Los Angeles as a Percent of High School Graduates, 1980-1986

	1980			1984			1986		
	% HS Grad.	% UC Enr.	Dif	% HS Grad.	% UC Enrol	Dif	% HS Grad.	%UC Enrol	Dif
Asian	4.7	14.9	+10.2	7.7	21.9	+14.2	8.8	23.1	+14.3
Black	12.3	6.3	-6.0	11.2	5.3	-5.9	10.8	5.4	-5.4
Hisp.	17.2	8.2	-9.0	22.6	8.7	-13.9	23.4	10.1	-13.3
White	65.8	70.7	+4.9	58.5	64.2	+5.7	57.1	61.4	+4.3
Total	100.0	100.0		100.0	100.0		100.0	100.0	

Table 3

Enrollment at California State University Campuses in Metro Los Angeles in Relation to High School Graduates 1980-1986

	1980			1986		
	% H.S.	% Enr.	Diff.	% H.S.	% Enr.	Diff.
Asian	4.7	10.9	+6.2	8.8	15.9	+7.1
Black	12.3	9.6	-2.7	10.8	6.8	-4.0
Hispanic	17.2	12.0	-5.2	23.4	12.1	-11.3
White/oth	65.8	67.5	+1.7	57.1	65.2	+8.1

Table 4

ETHNIC PATTERNS IN ENROLLMENT AND TRANSFER FROM METRO LOS ANGELES PUBLIC COMMUNITY COLLEGES TO ALL UNIVERSITY OF CALIFORNIA CAMPUSES IN 1986 and 1987

	1986			1987		
	% Enr. (1984)	% Tr. (1986)	Dif.	% Enr. (1984)	% Tr. (1987)	Dif.
Asian	10.1	13.0	+2.9	10.1	12.6	+2.5
Black	8.9	4.0	-4.9	8.9	3.9	-5.0
Hispanic	15.8	10.8	-5.0	15.8	11.2	-4.6
White/oth	65.2	72.2	+7.0	65.2	72.3	+7.1

*Sources: US Dept. of Education, HEGIS/IPEDS Data and California Dept. of Education; CPEC. 1987 Update
Tables prepared by Faith Paul, Metropolitan Opportunity Project.

There were many signs that the job of civil rights enforcement had not yet been completed. The evidence showed negative trends, many reaching their low point around the mid-1980s as key questions of civil rights enforcement were coming to a head in the Office for Civil Rights of the U.S. Department of Education. It is vital to understand what was happening within OCR as the situation of black collegians deteriorated.

The Reagan Administration's general opposition to civil rights and federal regulation greatly affected the efforts of the Education Department's Office for Civil Rights to enforce civil rights law. Although OCR enforcement had always been limited, reversals in the Reagan years were sweeping. The Administration leaders in Washington simply dropped the idea that the major segregated institutions must achieve either real integration or substantial equality for minority students. The officials assumed that racial barriers no longer exist and that all the problems of unequal education were in the elementary and secondary schools. While absolving the colleges, however, they also opposed judicial efforts to require change in the separate and unequal public schools, advocating dissolving court-ordered desegregation plans and cutting federal aid for compensatory education. In higher education, they concluded that states were in compliance with civil rights law even when all indicators showed things getting worse.

Federal officials have ignored very large state policy changes narrowing minority access. The Justice Department has fought to reduce judicial oversight of the government's civil rights enforcement responsibilities for higher education. Officials have denounced the very idea of measuring progress, giving a number of states official rulings that they need do nothing more, rulings that greatly increase the obstacles to enforcement of the law through private civil rights litigation.

The early settlement of the University of North Carolina case gravely weakened OCR policy and undermined OCR's professional civil rights staff, making it clear that colleges would not have to worry about failing to meet their student and faculty goals.

The Reagan administration officials systematically attacked their own professional staffs and openly fight civil rights groups. They demoralized the professional staff, driving many out of civil rights enforcement. They imposed a strong curtain of secrecy around all of these changes, trying to prevent outside analysis or criticism. During most of the Reagan Administration the OCR professional staff was distrusted, power was centralized to an extraordinary degree, and an atmosphere of secrecy and intimidation became pervasive in OCR. Professionalism was not respected; ideology was.

As soon as the Washington office became aware of the nature of our research in mid-1988, all inquiries to additional regional offices were referred to Washington and neither the regional or Washington offices provided any response to our Freedom of Information requests until after the end of the Reagan Administration. A very limited response, drawing only on "readily available" information, was provided in March 1989. The OCR refused to answer many of the questions or to permit access to its staff for interviews. It was, nonetheless, possible to conduct a number of off-the-record interviews with staff members who defied the secrecy directives.

My first attempts to interview those in charge, during a visit to Washington, failed completely. All previously arranged appointments were cancelled. The press officer said that he had been given orders by Mr. Pell, the Deputy Director of OCR, not even to make available copies of previously issued OCR annual reports to Congress and public statements. "My instructions," he said, "are to tell you what I have told you."(Interview with Gary Curren, Sept. 16,1988).

Subsequently, some of the public documents were provided but the agency provided no answers to the specific questions about its enforcement efforts. Freedom of information requests filed in July 1988 received no response from the regional offices and were all referred to Washington. No substantive response was received to those requests until March 1989 when a few pages of "readily available" data were provided. In studying OCR activities over a five administrations, this researcher never encountered such unresponsiveness or anything like the current intimidation and silencing of the professional staff.

Shrinking Resources. During the period between the last Carter budget (for the 1980 fiscal year) and the last Reagan budget, the Office for Civil Rights staff declined by more than a fourth (26%) and the budget fell in constant value dollars between 1980 and 1989 by more than half from the $45.8 million provided for the last Carter year. Although no civil rights laws had been repealed and Administration policies required extremely detailed investigations proving intent to discriminate rather than discriminatory results and more cycles of negotiation before anything could be done intensified the impact of the cuts. The law became vastly more difficult to enforce as the resourcs available fell sharply. The first budget of the Bush Administration, for Fiscal Year 1990, provided a real increase in resources for OCR for the first time since the Carter Administration.

Domination by Procedure. OCR became dominated by empty procedure. Deadlines were enforced fiercely as substantive requirements evaporated. People would be harshly punished for not completing an investigation on time on a case in which the agency was dead-set against taking any enforcement action.

Pressure to meet deadlines became so intense that it produced a major scandal within OCR, when staff members were caught backdating files. The final step came when the court gave up enforcing the deadlines at least for a time and the Reagan Administration continued to follow them anyway. The means displaced the ends and furious procedural procedural activity accompanied the abandonment of goals for real equity.

Approving Failed Plans. As the government pressed for release from court supervision it demonstrated the way in which it would interpret the demands of the law. Higher education plans in ten of the fourteen states under federal supervision expired during the 1985-86 academic year and the accomplishments were reviewed by OCR in a process that resulted in visits to hundreds of campuses and the gathering of rooms full of data memos and reports. (Sixth Annual Report: 7) In the 10 states whose plans were expiring, there were on-site reviews at all institutions. (Ibid.:38) Never had so much time and money been invested in studying racial patterns in colleges. The research showed a number of states not only failing to meet their goals for minority access but moving backward, as shown in the following table:

Table 5
Disparity between College Enrollment Rates of Black and White High School Graduates, Selected Adams States, Fall 1978-1985

	1978	1985
Arkansas	10.1%	13.1%
Florida	4.3%	8.9%
Georgia	16.8%	19.9%
Oklahoma	.6%	2.0%
Virginia	8.7%	20.7%

Source: OCR Draft Factual Reports on State Systems

Georgia: Approving Backsliding. The story of a single state can illustrate the problems created by non-enforcement. Georgia saw significant conflict over the Adams requirements, particularly over the state's new test for becoming an upper classman in the university system. In a July 1983 news conference, Governor Joe Frank Harris said that the Regents Test for graduating from college, attacked by local civil rights groups, was "not negotiable" and was "grounds for us to go to court."(New York Times, July 8, 1983).

OCR had received a complaint about the racial impact of the Regents test and spent a great deal of time investigating it. Although it was clear that it would have a disproportionate effect on black students, OCR decided to permit the test and to try to win assurances that special preparation would be made available at the black public colleges. Since the test would affect black students everywhere and the great majority were not in black public colleges this was a limited strategy, accepting a policy almost certain to negatively impact the achievement of the goals of the Adams plan.

On broader issues, OCR had singled out Georgia in early 1984 among the first six states with Adams plans as the only one that had not made substantial progress. After "extensive negotiations" the OCR ruled in September that Georgia had shown "substantial progress."(Fourth Annual Report, 49). The most important urban university in the state reflected the patterns of declining access. Georgia State University is a crucial institution for black access to public higher education in metropolitan Atlanta. It is the only public university in Atlanta and is located in the heart of the city, only blocks from the traditional main street of black Atlanta. Since there was no public black college in the metro area, GSU was the key institution.

The basic question was whether or not GSU should admit and provide the needed remedial training for substantial numbers of black students. Joan Elifson, GSU's assistant vice president for academic affairs, had intimate experience with the problems of poorly prepared minority students both at GSU and at Atlanta Junior College where she previously taught. She saw declining access for inner city students and an increasingly rigid set of tests and deadlines that limit access to college, limit what the college can do to help poorly prepared students, and made test scores more important than the judgment of the professors who actually teach the students.

The first stage of this process in higher education was the implementation of the Regents Test. Although three-fourths of students passed this test on their first try, it created a severe barrier for students from weak inner city high schools enrolled in weak junior colleges. The Atlanta Junior College, she said, teaches mostly students below grade level for whom the test was extremely frustrating and had a "deadly impact."

Most of the black students in GSU came in through a compensatory program called "developmental studies" which was created as part of the state university system's OCR plan. About two-fifths of GSU freshmen were in developmental studies, which meant that they had to take special remedial courses in math, reading, and/or composition. Most had to take courses in two or three of the fields. GSU decided to raise its minimum admissions requirements and its requirements for getting out of developmental studies and into normal classes considerably higher than the statewide standards, which would have allowed about three-fourths of the developmental students would take regular classes. GSU raised its minimum admissions scores on the SAT by

50 points in 1986, excluding about a fifth of the black applicants on the ground that they would not graduate anyway.

The state university system had decided by 1987 to require another year of high school algebra for admission to the university. This was another standard that doubtless had the greatest impact on black students.

GSU's developmental studies was hurt by the state requirement that all deficiencies must be repaired within four quarters. This requirement, for which Elifson saw "no educational justification" was a part of the state tendency to restrict compensatory education. Those working on the program, said Elifson, "feel overregulated at that point and the faculty are very frustrated." There were "entrance tests, exit tests, and limits on the time a student can stay in the program" and the program's faculty was kept separate from the general faculty of the institution. GSU was not comfortable with programs which had been created because of civil rights pressure, but were marginal and eroding without outside support. Restrictions on these programs were very important restrictions on the chances for college education for black students. OCR, however, made clear that the university system would not be held accountable for the racial effects of policies excluding black students or cutting academic support for them.

When the Georgia state plan ended far short of its goals in 1985 the regional office was not even authorized to ask the state to continue reporting data, to say nothing of requiring additional steps. The office sent out a letter in mid-1985 telling the states that they had the "opportunity" to submit data but requiring nothing. "There is a general understanding," said one member of the regional staff, "that we do not do anything controversial." Officials at the University of Georgia system said that they did not prepare studies of racial trends except when required to do so by the federal agencies.

Elridge McMillan, then Chairman of the University of Georgia Board of Regents, said that before the OCR informed the state system that it was no longer under its jurisdiction that the state had been prepared to respond to additional federal requirements. The governor had told the board, as McMillan recalled, that "I want you folks to do whatever we have to do ... not to lose money." When the system's leaders realized that "these guys are not going to do anything", attention turned to other issues. McMillan's judgment was that a few campuses had made a real commitment, but that the most powerful campuses had been slow to act. Many institutions had done very little and leadership was lacking within most campuses. When OCR "just walked away" from the enforcement process, the efforts collapsed.(Interview, May 21, 1987).

Georgia not only failed to achieve the specific goals but lost ground. In their final review, however, the federal officials simply left out all evidence of failure. The OCR, in its letter to Governor Joe Frank Harris, said that all that remained to be done was the completion of a few specific commitments primarily with regard to strengthening three black campuses. The OCR asked Gov. Harris for commitments to build or renovate buildings there and to provide joint management of agricultural extension by the Univ. of Georgia and the black agricultural school at Fort Valley State College. A final commitment was for a plan to encourage students in a white community college in Albany to transfer to a traditionally black four-year college in their city. No significant change was asked of the system or its largest institutions.

The letter to the Georgia governor praised the many positive steps that Georgia had taken, said nothing about the decline in black access to college and specific stated that Georgia's success should not be judged by whether or not it met its goals. Just a few small steps, the federal officials assured the governor, it would "bring Georgia into full compliance with Title VI."(Daniels to Joe Frank Harris, 2/9/88)

Three months later the Governor informed the federal officials that the matters had been taken care of and expressed his appreciation for "the cooperative relationship" with the OCR. (Harris to Daniels, 5/9/88). OCR acted in August, 1988 to accept the assurances of the Georgia Governor. "If the activities set forth in your letter are completed by December 31, 1988, as you have assured, Georgia will be in full compliance with Title VI, and no further desegregation measures will be required by OCR. (Daniels to Harris, Aug. 30, 1988).

Frustration on the Front Lines. Regional civil rights officials interviewed during 1987 and 1988 were frustrated and confused about the department's policy. None of the officials we were permitted to interview could describe any substantive policy for civil rights enforcement in the higher education.

Regional officials said that they had learned that headquarters would not approve the use of sanctions and they were forced to seek voluntary solutions if anything was to be done. They reported that the form of the enforcement process had almost totally replaced the substance and that the Washington office was not only unwilling to enforce sanctions but also not even interested in continuing to receive systematic data. The situation was deeply disturbing to many professionals in the agency because they believed that real progress was possible with reasonable support in Washington.

There was a tremendous pressure to meet deadlines, but no substantial guidance about how to do so. Pressures included withholding raises and promotions, creating an administrative situation which gave more rewards for dismissing a case or finding a superficial response than for a major attack on serious problems. Some regional staff members told congressional staff investigators that they were "encouraging complainants to withdraw complaints in order to decrease the complaint load and to diminish the pressure to investigate and close cases within certain time frames."(House Education and Labor Comm., 1988:27).

The branch chief in another regional office recalled the change. Prior to the Reagan Administration, she said, the normal sequence was to do the investigation, send a letter of findings and then negotiate. In nine-tenths of the case a corrective action was agreed upon in negotiations. In the Reagan period the OCR staff had to justify compliance reviews in advance and limit their scope and seldom had the leverage of a public letter finding probable violations. The policy was to put very little in writing and to send few letters of findings.

Needed Washington Support. As a result of the lack of support from Washington, OCR officials ended up not enforcing what many believed to be clear legal requirements, and negotiating whatever settlements they could. "There is no external pressure that we can exert and the institutions know it," another regional higher education director commented. One director suggested what would be needed for policy to make a difference:

> "What is needed in Civil Rights policy from a new administration is commitment to substantive civil rights goals and enforcement, clear policy direction from Washington, balanced use of negotiations and sanctions, freedom from arbitrary time constraints on case settlement, staff, time and money for program review at the regional level, support from Washington on referrals from the Regional Office, and more latitude to the regional offices. The federal government needs to identify areas needing rectification and give it publicity to get cases that are substantive, not just oddball complaints."

Political Inconsistency: An Intent Standard for Blacks and Hispanics but an Effects Standard for Asians. The Asian admissions issue was an example of forceful civil rights enforcement with a strong results orientation. The dramatic attacks by the Justice Department on leading American universities with declining Asian admissions produced an immediate response on campus. No such attacks were made on institutions that initiated new admissions requirements which lowered black or Latino enrollment. A consistent non-interventionist posture emphasizing university autonomy would have simply denied any valid federal interest unless there was proof of intentionally discriminatory activity (such a history was present, of course, in all of the states under Adams plans).

Even if there were a federal interest, the philosophy applied by the Reagan Administration in the southern cases would have suggested deferral to university authorities, even where there was a clear negative impact, so long as any kind of legitimate academic justification for the policy could be devised. Certainly, for example, there would be many professors on any campus who would favor increasing the centrality of English skills or diminishing the importance of math scores in admission for legitimate pedagogical reasons even on campuses where there was no significant Asian enrollment. Many researchers would no longer accept the characterization of standardized admission tests as genuinely neutral measures with high predictive validity. In fact a federal court in New York has ruled, on the basis of very powerful evidence that the SAT, for example, systematically underpredicts women's performance in math.

This does not mean that the Asian protesters were mistaken in raising their issues, only that if they and the government are to apply a results tests to policies hurting one, relatively privileged, minority community they should be consistent in applying the same results standard to policy changes affecting disadvantaged minorities.

Steps Needed for Serious Enforcement

Civil rights enforcement in American colleges and universities has never had high priority in any administration. Serious attention has been limited to the minority of states that once had *de jure* segregation in higher education. There has been virtually no enforcement in the North or West and no systematic attention to the situation of Hispanics outside of Texas. Most enforcement activity was due to the stimulus of a court which has now withdrawn from the effort to enforce the law.

The most basic features of a viable civil rights enforcement policy are lacking. There is no clear policy. The 1978 *Revised Criteria* could have produced real change if supplemented with more specific policies and seriously enforced. The *Revised Criteria* remain much less specific than the OCR regulations governing discrimination against women and the handicapped. Even a college administration wanting to comply would be unable to know what it should do. There is no systematic monitoring of data, even when there are very large negative changes across the country. The enforcement staff lacks crucial expertise and credibility and is profoundly demoralized. OCR provides no significant technical assistance to the colleges. There is no credible threat to use sanctions which would force college officials to make the issue a serious priority within their institutions.

The system is a wreck. It needs basic rebuilding and it may need some major new approaches. The most basic need is a clear policy backed by serious enforcement. Even those willing to comply without pressure cannot lead effectively toward an unknown goal.

The basic need is to focus the limited resources where they can do the most good. Highest priority in OCR should go to examining situations of deep and even increasing differences in access, internal treatment, and success within the various institutions under OCR supervision. If, for example, there is backward movement for blacks and Hispanics and other protected groups are doing relatively well OCR compliance reviews should give the highest priority to examining what is happening and acting against any discrimination found in compliance reviews. OCR now has so many diverse responsibilities that it is unlikely to have large impacts in any area unless it targets resources, seeks cases of potentially large importance, takes appropriate enforcement action, and, subsequently, builds the findings into appropriate regulations and technical assistance for other similar institutions.

SPECIFIC RECOMMENDATIONS

None of the basic essentials of an effective policy for civil rights enforcement now exist in higher education. The needs are as follows:

1) clear requirements

2) an effective data system with timely indicators of progress

3) professional investigations, monitoring, and legal analysis

4) involvement of higher education professionals

5) high quality technical assistance and dissemination of effective techniques for improving minority access and retention

6) a policy staff capable of collecting and using data and concentrating administrative resources on the most critical problems and institutions

7) systematic monitoring of institutions failing to meet goals

8) federal grant funds (both new and from existing programs) to help launch new positive approaches designed by colleges and to provide research testing their value. There should be positive national recognition by the Secretary of Education of successful models and funds for

disseminating them.

9) use of federal cut-off and litigation powers when needed, including a grant of more authority to communicate findings of probable violations to regional staffs.

10) a Justice Department strategy for enforcement and development of case law on effective remedies

11) adoption of systematic assessment procedures by the Education Department to assess the impact of major changes of federal and state policy in other areas such as financial aid and testing on minority opportunity for higher education.

Requirements. Since mandatory reassignment of students is not possible within college systems where attendance is voluntary and private institutions play a much larger role college plans must emphasize on broadening the choices and ending the stereotypes of institutions among students who are black or white while recognizing the special historic importance of black colleges and the need to enhance them and attract other students

The basic goal of the requirements, clearly present in the 1978 Criteria for the states with separate institutions, should be to move steadily toward narrowing the gap in college enrollment and completion rates for white and disadvantaged minority students (blacks, Mexican Americans, Puerto Ricans, and Indians) within their state institutions of higher education. The goal might be, for example, to eliminate at least a tenth of the gap each year. Institutions should be given broad latitude to develop plans that will work in the local context so long as they move toward the goals. Enforcement should be triggered only by failure to achieve progress or clear showings of policies or practices that have a high probability of harming minority opportunity. Public institutions should be required to assess the probable consequences of major changes in admissions and other policies that may affect access and survival of minority students. Faculty integration should be considered an essential element of the process, as it is in public school plans and colleges should be watched closely for progress in hiring and/or in producing minority faculty members. Such progress could include increased enrollment in on-campus Ph.D. and post-doctoral programs by disadvantaged minorities.

Equity would clearly require progress by minority students in gaining access to the traditionally white institutions, which have superior resources, curriculum, completion rates, and success in placing graduates in professional training and jobs.

It would also require upgrading facilities and offerings at traditionally black institutions to break the stereotypes of their inferiority. Regular progress toward integrated student bodies would be good indicators of success in meeting these goals in white institutions and some progress at black institutions would be an important indicator that policies had significantly lessened the stigma traditionally attached to these colleges in the white community. Priority in enforcing desegregation requirements should be given to full minority access to traditionally white campuses and to intense investigations of situations of rapid decline in the access of students from disadvantaged minority groups (African Americans, Mexican-Americans, Puerto Ricans, and American Indians).

There should be special requirements for communities with two or more racially defined institutions providing the same basic educational program. Duplicating entire universities is an extremely expensive and wasteful proposition and such areas should be required to develop plans for combined programs, for specialized programs on single campuses, for free exchange of students and faculties and cross-enrollment. They should be asked to systematically examine the possibility of merger of the institutions under procedures that guarantee protection of black interests.

Data. No administration has established a system of data collection that worked effectively. OCR has not effectively analyzed its own data and more than a year passes as the data is collected in the IPEDS, sent to a consultant, and eventually returned in the form of statistical reports that were still too complex to be of much use. As this is written, in July 1989, OCR has not yet prepared a data tape showing degrees received by race three years ago; obviously this is totally inadequate for serious analysis either by OCR or by outside experts and civil rights organizations. In the states where desegregation plans have ended, OCR has dropped its series of detailed reports and now receives much less adequate information. One of the important tools for civil rights compliance could be prompt public release of lists of the institutions and states with the worst and best records of increasing access for minority students and faculties but this has not been done. OCR has released extremely little public information during the 1980s. An effective program would have a few key measures that could be rapidly monitored each year. The data on these measures should be immediately entered into a simple data system readily accessible by minicomputer at each regional office and for responsible headquarters personnel. Such information should also be available to the press and the public. When these measures showed problems, then OCR could demand an explanation from state and local college officials. The lack of basic data, readily available, is the clearest possible indication that civil rights is not a serious organizational priority.

OCR should no longer be so dependent on outside resources for data analysis and make such weak use of the data that it does collect. An effective civil rights program needs a small analysis division including programmers and trained policy analysts together with the temporary help of outside contractors, which should develop yearly reports, available by Dec. 15, on the current years' enrollment, retention rate and level of transfers from two-year to four year institutions by race, sex, institution, and state. Data on degrees received and community college transfers should be available within six months. This would give the higher education community and federal policy makers clear and early evidence on new trends. By early spring of each year, there could be a full analysis of the previous year's faculty hiring results.

The OCR data experts could also draw upon and analyze other basic sources of student information, including those providing by large federal surveys such as the High School and Beyond survey and the Current Population Survey, as well as the 1990 Census. There should, of course, be a close watch of the relationship between the year to year trends in high school completion and college enrollment. All of this would have been very difficult to do when OCR was a new agency; it is now affordable and feasible. In the personal computer era it would not be difficult to provide all investigatory and legal staff with the capability to immediately recall present and past basic data about recipients and to compare their record with that of comparable institutions elsewhere.

Rebuilding the Staff. The professional staff of the OCR has shrunk, has lost many of its most dedicated and talented members, and has become burned out and bitter under hostile leadership. At times professional civil service staff who support vigorous enforcement of civil rights laws have been treated as suspects, accused of leaking information about nonenforcement, and seen as disloyal to their superiors who were dismantling the enforcement program. It still includes, however, many people who would like to be involved in a vigorous enforcement program.

OCR leadership should identify the most able staff members, reorganize the office to increase their authority, bring in top civil service managers from the Senior Executive Service, augment the staff where it is weak, and organize retraining and revitalization programs to communicate both the new policies and a sense of commitment to the organizational mission. The staff needs to be expended and to be reinforced with newcomers strongly committed to the basic mission, and to be retrained.

If most of the staff is to remain concentrated in the field offices, there will have to be intense training in all offices and considerable exchange of personnel between offices until the new standards and procedures are well established throughout the agency.

College Educators. OCR, even at its best, lacked staff with solid and credible experience within colleges and universities. College administrators and faculty members rarely believe that investigators in Washington really understand the nature of higher education. To some extent, of course, they are right. Colleges are inclined to oppose anyone attacking their institutions from the outside, often uniting under the banners of academic freedom, professional standards, and meritocracy. Within the academy, however, there is often intense self-criticism and almost always some wide variety of perspectives on the fairness of existing processes, and on the responsibility of the university to society. The OCR staff should include some academics perhaps through a combination of hiring people with substantial experience, encouraging temporary transfers from public universities under the Intergovernmental Personnel Act, and making liberal use of consultants, particularly in the early stages of the program's revival. University people are much more willing to concede problems and talk about practical alternatives to colleagues who understand the complexity of academic decision making and share the basic values of the higher education community. Plans designed by people with such experience are more likely to work within the decentralized structure of university governance.

Technical Assistance. Although many universities have learned how to increase access and success by minority students this experience has not been effectively summarized and communicated. One of the best ways to improve the process is to bring to bear the experience of counterparts in other institutions who have been successful. A good technical assistance program should include high quality research and dissemination, workshops, visits by counterparts, and support for experts able to work successfully with college administrators in drawing acceptable plans. All of these tasks should be supported by OCR and research offices within the Department of Education.

A Policy Analysis Staff. The federal government collects a great deal of information relative to college access but federal enforcement officials tend to have virtually no information about the relative importance of different types of work. OCR requires capacity to target limited resources on the problems that are the most critical for the largest number of beneficiaries and on the institutions that have the largest effects, directly and as leaders among their peers.

The policy analysis staff should include people who are trained in the analysis of large data sets on mainframe computers and people trained both in statistics and in education policy. This staff should work closely with top leadership in the agency, providing the best possible answers on the effect of various decisions and the degree to which institutions are successfully fulfilling their commitments. With the necessary information, the agency would continually improve its understanding of the value of various plan components, learn lessons for use in both enforcement and technical assistance, and have early warnings when things start to go wrong, warnings that might reopen negotiations and produce solutions rather than confrontations.

Regular Monitoring. Good policies, good information and good analysis are not worth much unless linked to regular monitoring. OCR monitoring has been extremely weak in the 1980s. There must be officials in charge of overseeing reports from each type of institution who will regularly review the data, looking for negative trends and checking in detail in institutions which fall well below their goals or are moving backward toward less access and diversity. OCR has been very weak in monitoring compliance. Skillful monitoring would identify problems long before they became massive and should be combined both with the opportunity for technical assistance and a credible threat of sanctions if nothing is done. With a good data system well integrated into OCR operations, monitoring could be a relatively inexpensive and effective way to leverage important changes and to avoid the development of severe problems leading to confrontations and litigation.

Incentive Grants, Pilot Projects and Research. The federal government rarely employs harsh sanctions against powerful institutions because of the political pressure that such conflicts almost inevitably produce. The normal way for the federal government to change the behavior of state and local governments and private institutions is through grants-in-aids, which are basically incentives or rewards for accomplishing some goal that the government believes to be important. The tradition of federal-state-local relationships is built around systems of grants, experimentation, and communication of results. Even the very controversial policy of school desegregation, for example, was substantially aided by a large grant program, the Emergency School Aid Act which lasted almost a decade until it was repealed in 1981.

The federal government should initiate a small program, perhaps $50 million the first year, to provide competitive grants to help fund planning and start-up costs for university and college equal opportunity plans. These grants should require a commitment for eventual transfer of the resulting programs that prove to be successful to the university's regular budget. Grants should be for three years with the government providing up to 90% of the cost the first year, 60%, the second, and 30% the third, in return for a long-term commitment from the institution. Federal funds from other related programs should also be coordinated with these efforts.

Grants should require careful evaluation of results. The Department of Education should also allocate funds from its research budget, or Congress should provide a special set-aside of research funds, for a systematic assessment of previous and contemporary experiments in increasing minority access and success in college. Among the subjects on which particular attention might focus in the first phase are the effects of financial aid cutbacks and regulations on black colleges, the seldom studied and precarious situation of college-age Hispanics, the rapid decline in the access to college of minority males in the past decade, and the very low transfer rates of minority community college students.

Demonstration of the Will to Employ Sanctions. Sanctions have large political costs and probably cannot be employed frequently except in the presence of an unambiguous political leadership dedicated to the pursuit of an urgent goal. The only time that this has been present in civil rights in American history was the period of 1964-1968. Unfortunately, higher education was not a central goal at that time. The ultimate credibility of any law enforcement program rests on the knowledge that there are penalties and that they may be employed. This seems self-evident, for example, in issue of enforcing tax laws. Civil rights laws are at least as difficult to enforce as the Internal Revenue Code. When the Education Department becomes seriously concerned about a policy area it shows its willingness to use sanctions, as it has done in the student loan default area. Any serious civil rights program must be willing to initiate fund cutoff proceedings and to carry out the decisions when there is no alternative. Experience shows that if the threat becomes believable that it will rarely be necessary to use it and that even those who lose funds will almost always find a way to come into compliance when there is a real price. Even a handful of fund cutoff proceedings would immediately change the seriousness with which university officials regarded civil rights requirements.

Litigation Program. A successful enforcement effort requires support from the Justice Department, the agency that coordinates civil rights for the government, represents the government in court, and plays an extremely influential role in the development of the law. This last responsibility is of particular importance in an area where the basic legal principals of remedy are still under development. A revived Civil Rights Division supporting policies requiring progress on the campuses would be critical to an effective enforcement operation.

Assessing the Effect of Broad Policy Changes. Civil rights enforcement is often treated as if it is a discrete function not related to the broad policy decisions of education agencies. If the goal of civil rights enforcement is properly understood as that of increasing real opportunities for disadvantaged minorities, it is very clear that this is wrong. Negative financial aid policy changes affecting low income students, for example, may undo the best efforts of colleges to recruit and retain such students. If states raise barriers to admission they may well seriously cut access. Excluding minority colleges from eligibility for student loan programs because of repayment problems could have devastating effects both on their students on the financial viability of the college. An administration making minority opportunity a serious concern in higher education policy would require impact assessments of major policy choices and encourage research on the effect of federal, state, and institutional policy changes on the situation of disadvantaged minorities.

Chairman Owens. Thank you.

I want to thank all of the panelists. I think all of you have unfortunately in studying your experience and your research, reinforced the findings of the committee, expanded and documented the findings of the committee in some cases.

We have a situation here which did not occur in a haphazard manner, not by accident. It doesn't relate to a few individuals. It is a result of a policy, a very negative and destructive policy that is being pursued.

I want to correct myself—before I mentioned the Republican candidate, when he launched his campaign in 1984. I meant 1980.

When Ronald Reagan launched his campaign from Philadelphia, Mississippi, he sent a clear message to the Nation that his party and he would take a different position on civil rights matters.

That was one extreme.

At the other extreme is the selection of certain kinds of people to appoint as judges to the Supreme Court which has produced a Supreme Court which also sends another message.

In the last campaign, the advertising campaign related to Willie Horton, which also exploited racism, acquiesces to racism, and pandered to racism, and that plays a major role in national politics.

The Republican party has actually adopted that as a major vehicle for getting votes.

However, Congress still has passed certain laws and it seems to me that refusal to enforce those laws is illegal regardless of what part is in power.

I want to ask you to think about it and give me your reactions today.

Are things like Choice—is Choice illegal in the fact that Choice is really when you examine it closely promoting activities which will resegregate schools, in many cases along class lines and practically all cases along race lines; class and race having a definite relationship in this country?

Also, what would you suggest Congress should do in terms of this continued pattern of refusal to enforce the law, the refusal to carry out the intent of Congress which ran through the previous Administration?

The Reagan Administration did it whether dealing with safety laws relating to workers or civil rights matters, they refused to enforce the law.

We see no indication of improvement with respect to the Bush Administration.

There are clear policies. They don't put them in writing, but the message is certainly circulated.

The message is certainly sent out strong and clear to the top people what the policies are and the workers, of course, in agencies like the Office for Civil Rights Compliance get these messages that, as you have pointed out, are the cause of a lot of demoralization and a lot of the attrition.

Is Congress helpless and how long will this go on? Should we have some kind of mechanism which would allow Congress to better enforce the law, better enforce, guarantee that the intent of Congress will be carried out.

Obviously oversight hearings are not enough, because I have sat through Government Operations hearings covering some of this same territory.

Repeatedly, we have hearings and the Administration representatives in essence tell us that that is the way it is, that is all we are going to do and the implication is you have no recourse.

I throw these simple questions out to all four of you to respond to as you wish.

Ms. **SIMON-MCWILLIAMS**. Mr. Chairman, I certainly would like to respond to the Choice issue.

I feel very strongly that Choice is certainly a way, and I think you will note in my testimony as I certainly did not provide it to you orally—that Choice is a way for some people to resegregate, if you will, and unintentional resegregation will also take place.

When one listens to certain words such as "Well, then the second-rate schools will close," in my opinion, this is a way of sifting through the various student populations and causing those who would, if you will, be able to succeed any way to cross over into a certain academic track or attend a certain school and those who would need assistance would not be afforded education in these schools of Choice.

If there is not written into the various regulations related to Choice and magnet schools then we will see an even more significant, if you will, amount of resegregation and not only by race, but certainly by caste, as you indicated. Those persons who are of a higher economic level will be able to get their children into whatever school it is that they choose; and second, they will be able to even go out of the system, if they will.

Mr. **ORFIELD**. I would like to speak to the choice question. It depends on how it is done. The entire effect depends on how it is done.

If it is just open choice with no restraints, it will unquestionably increase segregation probably by race and certainly by class.

We have experience of that in several cities that we are studying.

Magnet schools have very few poor children compared to other schools.

I believe there are four key elements in making a choice program equitable.

One is that there is really intense information provided to the low-income and non-English-speaking parents and that that should be on a person-to-person level, not just through brochures.

Second, free transportation must be provided unless you are going to stratify by class. Choice without free transportation is an economic-sorting device.

Another one is there must be civil rights goals. The school must be integrated and under a Choice plan and there should not be choices that increase segregation.

I believe that there should not be screening devices like tests to get into Choice schools, that will have a class and race segregating effect in most circumstances.

So I think that those things have to be attended to.

Chairman **Owens**. Do you think that the people who are pushing Choice will take any—will allocate any resources to carry out those four things?

Mr. **Orfield**. If they don't, anyone who is concerned about civil rights should oppose Choice proposals.

Chairman **Owens**. On the basis of your experience, do you think they will?

Mr. **Orfield**. Most of the proposals don't provide these essential things. Also, Choice, where it is going to be across district lines as it is in some of our school desegregation consent orders in places like St. Louis or Milwaukee or in Minnesota, under State law—there should be strong efforts to make good suburban school opportunities available to inner city minority students who are in inferior schools by every possible measure.

I think Choice should be inter-district.

Mr. **Lichtman**. I would like to comment on what should the Congress and the committee do in response to protracted and chronic failure to enforce Title VI and other civil rights statutes by the Office for Civil Rights.

I think the answers come down to basically the oversight area and the appropriations area.

For example, the House Committee on Government Operations, I think, did an extraordinary service as did this committee in coming out with the reports that they have come out with.

To use the example of higher education, which I focused on when the House Committee on Government Operations found that the vestiges of segregation have continued and said it like it was, they did an enormous service for the country, but that was 1987 and I don't know of any follow-up since 1987 by the Congress.

OCR should have been called to account for its failure to deal with these vestiges and called to account by this committee also, in the sense that a hearing should be held as a starter, and questions should be posed forcing them to explain how could they have approved these plans when most of the goals and objectives of these plans have not been met.

How could they shift their standard for review to one of whether or not the States were carrying out certain steps regardless of the result of those steps.

We have had a very pernicious shift in the standard of compliance.

No longer is there concern about whether the plans work or whether or not the goals or objectives are met.

Desegregation is declared on the basis of carrying out certain steps regardless of result.

This committee would do an enormous service, I think, in forcing them to justify what I think is a wholly unjustifiable position and if they won't carry out their statutory duty, I think—to second the view of my colleague, Ms. McClure—I think appropriations is the next step, that members of this committee would testify and that the OCR would be told that if they don't carry out the statute, they won't have the funds.

Chairman **Owens**. Ms. McClure?

Ms. **McClure**. Another way to approach the appropriations is to earmark or indicate that it is expected that the department will spend out of these appropriations such funds as are needed, and then list it.

I am frustrated, too, but you have to keep at it; persistence. Do more hearings.

In fact, the committee might consider—the full committee, might consider creating a special subcommittee or designating an existing subcommittee to focus on this.

I mean, there have been plenty of examples of the Congress going after non-law enforcement—the Environmental Protection Agency, for example, comes to mind in the first Reagan term when the Congress just went after it and after it and finally got somewhere.

They exposed some things.

I know this committee has a very full plate, especially in a year when major programs have to be reauthorized.

I suppose—you are in a position which the Legal Defense Fund isn't. You write to the Secretary and ask for a policy on Choice.

Don't ask Mr. Smith, because Mr. Smith has to do what across the street wants. Across the street is OCR parlance for the Secretary's office, the General Counsel's office.

It is those people that make those decisions. So you have got to go across the street, too, or bring across the street to the Rayburn Building.

Chairman OWENS. I throw out one question that you can consider and I would like a response in writing, since you have wrestled with this problem quite a bit.

I have been here seven years so I am still considered relatively new, but I don't know why we can't push for a congressional solicitor, someone to take the Administration to court.

We had an experience with disability, people being knocked off the rolls with respect to disability, but Members of Congress joined citizens and went to court and the court ordered the policies of the Reagan Administration be reviewed and in the meantime people had to be put back on.

There have been cases where citizens go to court, and Congress goes to court and gets results.

I don't know why Congress can't have at its disposal a solicitor who goes to court to force the Administration to carry out the intent of Congress.

Think about it and I would appreciate your response.

Chairman OWENS. I have one quick question. OCR reported in its fiscal year 1988 annual report that it met over 90 percent of its Adams time frames for complaint processing.

Do you believe that these statistics are valid?

Mr. LICHTMAN. That is difficult for us to evaluate because since the order was dismissed, they have refused to share the information with us. They no longer report to us.

Even if they are valid, they are only part of the story. Obviously the substance of what they decide is very, very important and to the extent that they have met the time frames, for one thing, you would have to look at do they meet the time frames on acknowledging complaints on the substantive decisions on letters of findings and enforcement decisions.

You have to look at those data very closely, but you also have to look at what they decide.

To the extent that they are dismissing the complaints, it doesn't help much that they do it on a timely basis.

Ms. **McClure**. I think it is a fraud.

In the summer of 1985, we were still getting reports and we did an analysis of the time frame and there were four separate ones and we did it by region and within region by jurisdiction.

It was an awful job.

What it shows in the first time frame is do they acknowledge receipt of the complaint?

Well, gee whiz, golly, they got nearly 100 percent on that one.

The next was, did they complete the investigation?

They didn't get anywhere near 100 or 90 percent on that.

Did they issue the letter of finding?

And the fourth time frame is, if they had not secured voluntary compliance, did they take the case to administrative enforcement?

It was interesting to note that there were a number of due dates declined in each of the four categories, so you might start with a thousand due dates and do they acknowledge receipt of the complaint?

By the time it got down to did they take any enforcement action, it was down in the low hundreds.

If you add those together, the high 100 percent for acknowledging—almost any agency can acknowledge within 15 days receipt of a complaint. When you add those together, sure they may get 90 percent, but disaggregated, the story is different.

Chairman **Owens**. Thank you.

Mr. Hawkins?

Mr. **Hawkins**. I think in answer to one of the questions, Dr. Simon-McWilliams indicated a view on Choice and I think Mr. Orfield seemed to not completely agree with the statement.

I think that Dr. Simon-McWilliams had made him a prepared statement. I wasn't so sure. It seems to me some clarification was needed.

Mr. Orfield seemed to suggest that with a number of limitations of certain conditions, that Choice might work. However, these are not included in any of the proposals that I have seen being advocated by those who advocate Choice. If they were, there would be no reason to have Choice because they would make the schools better if you met those conditions.

But the statement that I read goes much beyond a gimmick called Choice because I don't know where the idea originated or who originates the idea or who decided this was to be the cornerstone of education during this administration. Certainly it is not a policy because no policy has been enunciated.

It is something that arose and they are using it because I suppose it justifies the budget cutbacks. You don't have to spend money on it if you advocate that States and local districts can go ahead and open up enrollments. But the issues seem to have been brought to focus in Dr. Simon-McWilliams' statement where she said that public school Choice will force the system to put competition back into education.

Who decided that we need to put competition back into education? What type of competition are they talking about? Will it be the competition that will allow schools to be selective in the students that they receive, that would reduce their costs and improve their profit rating? If we are going to talk about competition, I suppose we should talk about schools making their profit of some kind. I am not sure who decided that.

The idea that in some way we are going to upgrade the second-rate schools or close them, then what are we doing to upgrade the schools? So I guess we get down to the question, are we going to close up those schools, and how many students who are in those schools we close up. What becomes of the schools we close? Would you elaborate on that statement?

Ms. **Simon-McWilliams.** This is a statement——

Mr. **Hawkins.** I will ask Mr. Orfield about his so-called limited Choice and all the good things that he thinks are going to be done to make Choice work when the President has already decided at the summit in Virginia with the governors that he is going to deregulate the schools.

If he is going to deregulate and let them have the Federal money with no strings attached, then obviously you are not going to have any conditions.

Ms. **Simon-McWilliams.** I noted that in my presentation on page 7 and indicated that desegregation is lost in efforts to reform school standards of competitiveness, aggressiveness and survival of the fittest.

In my opinion, it is taking us back to sifting through the school population and saying that there are only a few that we want to send through the system, the others be damned. This is what I see that the Choice move, if you will, is perhaps leading to or it could lead to.

I noted, as I put in quotes, the words "public school Choice will force the system to put competition back into education to upgrade the second-rate schools that are closed." That statement was made by a person from the Department of Education and I would expect that that goes back to that competitiveness, if you will, and filtering out those creating the class system within our society.

And when one is bold to make the statement to upgrade the second-rate schools or close them, I should underscore that that is truly a bold statement because we know that the schools that have been attended by, if one would call second rate, were those schools that are dilapidated in physical plant as well as wanting an instructional staff, and those schools are usually within the inner-cities where we have the largest group of minority students.

I made the statements and put in quotes, but I also say that I shudder when statements like that are made by persons who are leading our national education system, because it certainly appears to me that there is an intent of, if you will, moving back to a segregated society, not only by race but most assuredly assuring that it will be by class.

Chairman **Owens.** Secretary Cavazos actually made that statement at the University of California at Los Angeles and again before this committee, so I guess we could credit him with the statement and also the statement that he would not countenance any type of segregation along with it. However, there seems to be some dichotomy involved in that.

Now, Dr. Orfield, you have indicated that you thought that under certain limitations then we could make Choice work, and I wasn't so clear on who is going to be responsible for those conditions. Who is going to pay for the transportation, for example? You said transportation—those advocating Choice. Let's say the department is advocating Choice but it is not suggesting that it is going to put up any money to do it, then that first condition, one of the conditions you mentioned is out of the window to begin with, assuming that that would be required as one of the conditions.

I have forgotten some of the other conditions, but they are all local decisions to be made, that are not included in what is being advocated at the Federal level. Who would be responsible for, let us say, making sure those conditions prevail?

Mr. ORFIELD. Well, I think that one of the things that should be done is that there should be some civil rights guidelines on Choice plans which should be issued by the Office for Civil Rights and the Justice Department, and they should incorporate those requirements.

If you are going to have Choice, you can't make Choice depend on the wealth of the family or depend on them knowing the intricacies of the bureaucracy of the school district, so they can get through a very complicated system. You have to make the system accessible and have a set of desegregation goals.

The reason I think that it may be worth pursuing this, in those cases where we can get those protections, is that there are a lot of schools that are not functioning. In our city of Chicago, of the 65 high schools I would estimate 60 of them are not preparing students for college adequately and they do need to be shaken up and we need to try everything we can that does not have inequitable results.

So I think Choice is one of the things that we might explore if we have the right protection. But if we don't have it, it should not only be prevented, it should be opposed by some Federal civil rights officials.

If Congress is going to mandate or encourage Choice, it should be included in the funds that Congress dispenses for these programs, either Congress itself funds these necessary elements or school districts can receive the Federal grant funds only when they provide those necessary elements from local funds. They have to come from one source or another, or Choice should not go forward.

Mr. HAWKINS. They never came before Congress before this. There is a bill pending in this committee to establish it legally, but this bill has not been introduced. It has been proposed.

One of the conditions seems to be as to whether or not a school would be selective. We compel children to go to school—that is the States do—to a legal age and a neighborhood school, an ordinary school can not reject a student. A student comes, registers and that is it. Under the school that has been designated as a Choice school, that school has the right to refuse a student if the student doesn't live in that attendance area. If you are going to have competition, fair competition, you would compel every school to accept any student.

Mr. **Orfield**. I think that that is right, Congressman.

Mr. **Hawkins**. That would be one of the conditions It can't be selective, if you are going to get the Federal money, you can't discriminate against, on any basis, the student who comes to that school. If you do that, obviously you would destroy the idea of Choice.

Mr. **Orfield**. That is right. I think that the selection procedure should be a random selection from the students who are interested, subjected only to a limitation on civil rights grounds.

In other words, if the initial choices would produce a segregated school that should not be allowed but otherwise students should not be screened out of Choice schools on standardized tests or other kinds of procedures. They should have a right to go there just like other public schools and it should be on the basis of their interests or if their parents think it is beneficial for them. There should be a system of randomized selection that permits every student to have an equal chance to get into those schools. Also there should be civil rights guidelines to make sure that they are integrated.

Ms. **Simon-McWilliams**. In the Pacific Northwest, I think perhaps some persons may like to visit a couple of school districts where Choice, if you will, has been in effect long before it became the activity of the administration. I think that they will find that our desegregation assistance center is working with these districts because racial segregation has taken place.

If, in fact, the districts have those dollars available that are necessary, and I agree, if it was necessary, to pay for the transportation, if you will, and also to have the necessary support so that parents will understand what Choice is all about, then perhaps you can look at those dollars and utilize them within those schools that are now called segregated and all schools then could become a part of that mix of Choice.

Mr. **Hawkins**. Thank you.

Chairman **Owens**. Mr. Orfield, would you say that Choice schools ought to have a lottery system for the admission of students. Is a lottery the only just way to do it?

Mr. **Orfield**. I think the best way to do it is not to do it on first come, first served because that will advantage parents with the most information.

The best way is to have desegregation goals and within those goals, allow students to register as a matter of right and choose from those who want to go by some kind of a lottery system.

Chairman **Owens**. Thank you.

Mr. Payne.

Mr. **Payne**. Thank you.

I think this is a very interesting conversation and I appreciate you experts giving us some guidance on this very important subject. I think that the question of choice is an issue that we are going to have to wrestle with so I appreciate the opportunity to have this dialogue.

Of course, the first problem is that of nomenclature and that this whole thing is called Choice. I wish there was another word because our colleagues are so anti-choice. It seems like when it comes to a woman's right to choose, then to use the term choice is bad. I think it is going to mix the bad guys up with the good guys, or maybe it is consistent, the more I think about it, because I can't see under the current set of circumstances, how this whole question of choice will be able to work especially if you are saying let the Justice Department, let the Office for Civil Rights monitor to make sure the system works. We have seen very clearly over the last 10 years what happens when you have the wolf watching the chicken coop. So therefore, it is doomed to fail.

The whole question of when do you stop Choice—if a school is known to be very good in an area and everyone is going to apply there, how do you determine who can go?

Also, on the question of Choice, those who are better informed and have parents who may take interest or have the time to make evaluations and all that is necessary, they are going to be the ones that are going to end up in the Choice schools in the first place and those people who need the assistance and the prodding to be able to understand the importance of education will fall down to the bottom tier.

It is even interesting that on the question of Choice, we find that in 1879, in the Ferguson case—the Supreme Court found segregation was constitutional, and in 1954, *Brown* v. *Board of Education* found unconstitutional. We are going to be able to almost take both cases and find another way to legally resegregate through this question of choice.

I doubt seriously if—those points you raised, Dr. Orfield, are excellent, but I don't see anyone taking time and interest in doing those things. Therefore, Choice is doomed to fail.

Surprisingly enough, with the new progressive government of South Africa, they talk about dismantling apartheid and going to the beach if you want, but there is one provision that they are holding closely and that is the group right to choose. It is called the same thing, Choice. Choice simply means that a community in South Africa, even when apartheid laws are dismantled, will have the right for group association, it is called. You decide who you want to live with, whether you want to go out at night, what kind of club you want to go to, where you play golf and I guess where you send your kid to school. That is pro-choice.

I see a lot of serious difficulties in this whole question of the voucher system, basically that is what I call it. I would appreciate it if you could give me your written thoughts.

I think your thoughts are good and maybe that we would be able to—because if we knew the answer, we wouldn't be asking you the questions, that is for sure. So it is not that we are here saying your answers are faulty. We have no answers either.

So if you could think through this and give us some information, I think that that would be helpful to us as we grapple with this question which is certainly going to come up before us more and more in the future.

I don't have any questions unless anyone wants to comment.

Chairman OWENS. Mr. Hayes.

Mr. HAYES. Mr. Chairman, I heard you at the beginning when you said that we are running behind schedule. In addition to that, I was hopeful that we would be able to make up for some of that lateness by shortening our lunch, which I still have hope we can do it.

Second, there is a limit as to what that portion of the human anatomy which you sit on can endure. We have been here better than three and a half hours now, and I am going to just comment by saying that we have benefited from what has been excellent testimony from all the panelists.

The one question that I might have, and I will certainly go through the prepared testimony, because it is enlightening in many respects—I would like to just say as I look at this report on resegregation of public schools in the third generation, some of you all made contributions to the preparation of this report.

You, Dr. Orfield, I am tired of hearing this about Illinois leading the pack in this whole area. I find myself in a somewhat defenseless position. Yet, when I see a situation where in the suburban schools, public schools surrounding Chicago, where the State of Illinois spends almost $800 a year per student on a kid who goes to school in the suburbs than they do on a kid who goes to school in Chicago, where I see a situation where at the University of Illinois, which has an enrollment I think of almost 30,000 students, less than 2 percent of that number I think are African American students, and I see a growing number of Asians. They are being afforded an opportunity to get an education which African Americans can't get, and you weigh that against the increasing cost of tuition, with a lessening of Federal help to those students who need help. I wonder if we have a way to solve this crisis based on the current approach because there are kids who want to go to school, yet we have a drop-out ratio in black areas of the city of Chicago that are hovering around 50 percent.

When we here in this Congress have trouble funding a measure to combat dropouts to the tune of some $50 million, which is pocket change by the way we spend money. It is not one of our top priorities. I think we have got to begin to make this one of our top priorities and I certainly think you people in the education field, if we are going to be faced with it in the next 10 years, people have no longer a desire to even become teachers.

The decline in the number of black students who want to study to go into the teaching profession is declining. There are reasons. I don't want to get into them, but I am trying to lay out what I see as some of the problems that we face which leads to the conclusion, I guess, in part to the resegregation of the public schools, not just in the South, where I marched along with others to open up those schools and create opportunities, but when we sit here and continue to see the Justice Department refusing to do anything about changing the course that we are traveling except to come up with a so-called solution of maybe Choice, I know in front that many of the kids in my area, in my district, they have no choice. They have to go to the school they can walk to and hope they can get breakfast when they get there, particularly at the elementary level, because that is where they eat the third and fourth week of the month.

Do you want to respond?

Mr. **Orfield**. About half of the black and Hispanic students in Chicago aren't finishing high school and there is very little help in drop-out prevention programs from either the State or Federal

Government so far and those students are doomed in terms of employment prospects as adults.

What we find is that five out of six young black men between 18 and 19 don't have jobs in Chicago. It is just a shocking situation that the black enrollment at the University of Illinois, Chicago campus, which is in the middle of the city, went down over 40 percent in the first four years of the 1980s. Tuition is one of the most expensive in the country.

Public tuition in the country has raised substantially faster than family income. Racial income gaps have grown during this decade and Federal financial aid covers a smaller and smaller percentage of that.

We show, in research we will be releasing soon, that even for those students who graduate from high school in our big cities, less than one out of 10 is finishing college in the 1980s.

We have a terrible situation and it relates both to civil rights enforcement, because the University of Illinois and other campuses are adopting increasingly demanding requirements to get in and are eliminating remedial programs, and it relates to financial aid, which is something that if we are going to get low-income students to go to college, we have to fund them more adequately, especially in the first two years of college. They can't afford huge loans.

The committee and the Congress have failed to fund those scholarships at a level that makes it possible for low-income students to pay these rapidly increasing tuition loans. I think it is one of the hardest issues we have to face.

Ms. SIMON-MCWILLIAMS. With that type of information and that that you have afforded, my question is, from what will these children choose? If they are dropping out of school, if we do not have the support for them to travel to these various schools, if they are not able to go to college, what is out there for our children to choose and what will be left when they do close, if you will, those second-rate schools, as someone is calling them?

Chairman OWENS. Thank you very much.

I would like to note that the panel has been quite informative and inspiring. We do appreciate your being here and would like to submit some additional questions to you in writing. We will hold the record open for that.

Mr. Smith, who had to go, Mr. Smith, the Member of Congress on the minority side, specifically has questions that he would like to submit to some of you.

I would like to leave you with one question that I didn't get a chance to explore. Should Congress take steps to prohibit Federal education aid to States which discriminate in their distribution of education assistance funds within their State?

Formulas which have a result of being discriminatory have been promulgated for a long time by numerous states, including the State of New York. When you advance a formula which insists that you must allocate State assistance funds on the basis of attendance instead of enrollment, that is a discriminatory formula which is used quite a bit in a number of places.

We wonder if Congress shouldn't take some action to press States to be fairer in their own distribution of State aid funds to education. Inner-city communities where there are large numbers of minorities are inevitably the victims of these kinds of discriminatory formulas.

Thank you again very much.

We will recess at this point until 2 o'clock. It is going to be a shorter recess than we planned, but we will resume testimony at 2 o'clock.

[Whereupon, at 1:20 p.m., the subcommittee recessed, to reconvene at 2:00 p.m., this same day.]

Chairman OWENS. The committee will please come to order. For the afternoon hearing session, we are going to combine panels 1 and 2 for the afternoon.

We also have a substitute person testifying. Ms. Pamela Monroe Young will join us, replacing Althea Simmons, who could not be here. She is a Legislative Counsel with the NAACP, Washington Bureau.

David Chavkin is the Senior Program Analyst for National Center for Clinical Infant Programs. Ellen Vargyas, is representing the National Women's Law Center.

Norman Cantu, Esquire, is Director of Elementary and Secondary Programs of Mexican American Legal Defense and Education Fund. And Susan Liss, from the Citizens' Commission for Civil Rights; accompanied by, Elliot Mincberg, Esquire, People for the American Way; and James Lyons, for the National Association for Bilingual Education.

We will begin with Mr. Chavkin.

STATEMENT OF DAVID CHAVKIN, SENIOR PROGRAM ANALYST, NATIONAL CENTER FOR CLINICAL INFANT PROGRAMS; PAMELA MONROE YOUNG, LEGISLATIVE COUNSEL, NAACP, WASHINGTON BUREAU; ELLEN J. VARGYAS, ESQUIRE, NATIONAL WOMEN's LAW CENTER; NORMAN CANTU, DIRECTOR OF ELEMENTARY AND SECONDARY PROGRAMS, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; SUSAN LISS, CITIZENS COMMISSION FOR CIVIL RIGHTS; ACCOMPANIED BY: ELLIOT MINCBERG, LEGAL DIRECTOR, PEOPLE FOR THE AMERICAN WAY AND JAMES J. LYONS, NATIONAL ASSOCIATION FOR BILINGUAL EDUCATION

Mr. CHAVKIN. Good afternoon.

As I was listening to Mr. Smith's and Mr. Turner's testimony this morning, I began to get a feeling that OCR and the Department of Justice have done a pretty horrible job with regard to Title VI and Title IX.

It is because they have been putting all their efforts into enforcing Section 504 to protect the rights of persons with disabilities.

Then I remembered I was going to be testifying about what a terrible job they had done. I began to wonder what it was they had been doing.

The major difference, I think, between the civil rights issues affecting women and minorities and the record of OCR and the Department of Justice and the record affecting persons with disabilities has been that whereas the department has frequently gone out of its way to show active hostility to minorities and women by intervening in litigation and by other activities, the record with regard with disabilities is very different.

There is almost a complete pattern of neglect, not benign neglect, but just complete neglect. What I want to do is focus on a few examples of that.

I am going to be deviating largely from my testimony, which I know will be included in the record. I will focus in part by responding to some of the concerns that came up this morning.

Two points especially come to mind. The first was the point Mr. Turner made about the extent to which the Justice Department has been an avant-garde of the civil rights movement.

Mr. Hayes is already chuckling. Obviously, you took Mr. Turner to task and set him straight with regard to Title VI.

However the record with regard to Section 504 and the education for the handicapped act may be even worse. During the 1980s there were six or seven major cases that went to the United States Supreme Court on the rights of persons with disabilities in programs that are either administered through or funded by the Department of Education.

In one of those cases, the Rowley case, the Administration joined the side of the parents. That may have been the "kiss of death" because they lost as a result.

In three of the remaining cases they didn't even get involved at all. I want to talk about some of the specifics of that.

The other two, which the department lost, joined the side of the school system. So the litigation record is hardly one to be proud of.

Mr. Turner talked about the recent First Circuit case. Let's hope that case is a turnaround, that it is the start of a new effort to properly address the rights of persons with disabilities.

The other major point came up with regard to the case statistics and the extent to which the handicapped discrimination complaints have dominated the work of the Office for Civil Rights.

Going back to some of those statistics, if you look at them a little closer, the record is not quite as significant as it might appear at first. First of all, those complaints that were withdrawn, this whole issue that the staff and a number of members raised this morning, 33 percent of the handicapped discrimination complaints were withdrawn prior to action by the Office for Civil Rights.

If you look at the additional cases in which there were closures with no violations, which were 49 percent of the letter of finding closures, the total closures in which no violation or no positive action occurred, 67 percent.

Mrs. Lowey raised the question of, you know, what does that tell you. Mr. Smith's response was, "We can't find a violation if there is no violation."

The other way of looking at that is it may be that the office is simply not looking hard enough. Part of that raises this while problem with regard to policy development that I want to get into in a moment.

The other thing about case statistics is they don't tell you much about the qualitative actions of the Office for Civil Rights. It is one thing to find a violation where to get corrective, there is no lift on a bus or where a ramp needs to be put into a school to allow a person with mobility impairment to get into the building.

What that doesn't tell you is what happens when the person gets into a classroom. That is where the Office for Civil Rights really has been most grossly lacking.

Part of that fact is due to the absence of policy development, the staff report on page 4, item 13, talked about the consensus among OCR regional staff and that few useful substantive policy directives have been issued since 1981. One of the specific recommendations in number 8 was that policy directives should be developed and distributed on a wide basis.

Obviously if you want people to obey the law, you must tell them what the law is. One of the critical problems is that nothing has happened in terms of policy formation since the re-promulgation of the old HEW Section 504 regulations when the Department of Education was created in 1980. There has been nothing significant on the regulatory horizon in terms of formal regulation or in terms of interpretative rules.

Perhaps the most gross example of that is described in my testimony with regard to the question of availability of related services. This is in the written testimony on page 8.

One of the ongoing problems under the Education for the Handicapped Act is the extent to which children with disabilities are entitled not only to specialized instruction, but also to such related services as social work services, counseling, physical therapy, occupational therapy, and those kinds of things. Some of those related services, if they are not provided, actually prevented the child from attending school.

It would be as clear as closing the door to that child. On January 19, 1981, the last full day of the Carter Administration, a notice of interpretation was published in the Federal Register with regard to the coverage of clean intermittent catheterization. This procedure is commonly done by family members, but can now be done by individuals other than medical personnel.

It is essential for a child who is unable to empty his or her bladder completely. It allows that child to attend class until they are able to catheterize themselves.

The notice of interpretation that was issued said this is a required related service under Section 504 and the Education for the Handicapped Act because it is necessary to allow children with that kind of disability, in this case it was a neurogenic bladder, to attend school.

February 17, 1981 the Reagan Administration postponed the effective date of the policy statement until March 30, 1981, a little over a month.

March 27, 1981, the effective date was postponed again, this time until May 10, 1981. On May 8, 1981, the effective date was postponed again, this time until further notice. We are all still waiting for the further notice.

What happened instead was a child, who was being excluded from school because of the unavailability of that service, went to court. The case ultimately got up to the United States Supreme Court. That is the case of *Irving Independent School District* v. *Petro*, described on page 9 in the written testimony.

The Supreme Court said that was a required-related service because it was necessary to allow the child to attend school. Curiously, the Administration, which is again, supposed to be the avant-garde of civil rights enforcement under their own description, didn't participate in the case.

The Solicitor General was absent from any involvement of the case at the Supreme Court level.

One of the things that happened later is the whole problem, and it is really a policy matter that is going to come within the jurisdiction of this committee, and that is the extent to which Section 504 still applies in cases that arise also under the Education for the Handicapped Act. This problem is described in the testimony on page 5, it is the critical difference between Section 504 and Title IX and Title VI with regard to the rights of children.

Most of those rights are defined by the EHA. What happened in 1984 was the Supreme Court decided the case of *Smith* v. *Robinson* which, the court said that where the child was proceeding under the Education for the Handicapped Act, you couldn't bring the action in Section 504.

It arose really on the issue of attorney's fees because at that point attorney's fees were only available under Section 504, not under the Education for the Handicapped Act. The Supreme Court said Section 504 adds nothing to the substantive rights of a handicapped child and we therefore cannot believe that Congress intended to have a careful balance structure in the EHA upset by reliance on Section 504 for otherwise unavailable damages or for an award of attorney's fees.

In a large part, as a result of the actions of this committee and a comparable committee in the Senate, the Handicapped Children's Protection Act was passed in 1986. That established the right to attorney's fees.

What it didn't do was grapple with the whole question of the extent to which Section 504 is a valid right of action, a valid basis on which to allege complaints under the EHA. Therefore, a large number of issues in which Section 504 really is critical is where the EHA rights simply don't go far enough. Let me give you one example of that.

All of us know that minority children are disproportionately placed in special education programs. They are either labeled as educable mentally retarded or as emotionally disturbed.

All of us know that. We got it from anecdotal experience.

In 1979 there was survey data developed by the Department of Education that reinforced that. What we don't know is why that is happening, nor has the department thought about what to do with that.

Well, that obviously raises Section 504 issues because the local education agency has been identified as regarding those children as handicapped. They are, therefore, protected under Section 504.

Even though they are not handicapped in many cases, they are being regarded as handicapped, the third prong of Section 504 definition testimony. They are not being educated in the least restrictive environment.

They are being educated in a restrictive environment, to their advantage. That is a Section 504 issue in which the Education for the Handicapped Act is not much use.

Other examples are described in testimony. But it is really critical that this committee and furthermore the Office for Civil Rights itself, begin to grapple with that issue. Even with those uncertainties under the EHA, it is important to recognize that the non-EHA issues in education also haven't been addressed.

Some of those are highlighted towards the end of my written testimony, but they involve such problems as the discrimination of vocational rehabilitation programs against children with severe disabilities despite some of the statutory protections that this committee put in place. It involves discrimination of vocational education programs against children and adults with disabilities and the failure to provide reasonable accommodations to ensure that those persons are main-streamed and realize their potential.

So there is a wide, wide disparity between the impression that was left with the committee this morning and the reality of what has happened both in terms of policy development, which as the staff noted and as the committee pointed out, is really the underpinning for both technical assistance and voluntary enforcement, and on the other side in terms of meaningful enforcement of civil rights for persons with disabilities.

Why don't I stop there and let Ellen proceed.

Chairman **Owens**. I am sorry. I neglected to point out the fact that we have your written testimony, and the entire written testimony will be entered into the record.

Ellen Vargyas, National Women's Law Center.

Ms. **Vargyas**. Thank you very much. I am very pleased to be here today in a dual capacity as an attorney with the National Women's Law Center and also as the Chair of the Coalition for Women and Girls in Education.

While both the coalition and the law center are deeply concerned with the full range of civil rights enforcement, our particular focus is the enforcement of Title IX of the Education Amendments of 1972, the statute which prohibits sex discrimination in education programs and activities which receive Federal financial assistance.

My testimony will therefore concentrate on issues regarding Title IX although many of the concerns I will voice apply equally to the enforcement of the other civil rights statutes within OCR's jurisdiction.

In addition, because I understand that many procedural problems in OCR enforcement, for example, compliance with time frames, avoidance of the Letter of Finding process, et cetera, are being addressed by other witnesses, I will focus my remarks on the substantive aspects of Title IX enforcement.

It is both timely and important for this committee to exercise its oversight jurisdiction regarding the Office for Civil Rights in the Department of Education. We start with the proposition where serious concerns are raised by the failure of the Administration to nominate a Secretary for Civil Rights.

When viewed in combination with the significant decline since 1980 of OCR's budget in real terms and the well-documented and pervasive failures of OCR during that time in handling complaints and conducting compliance reviews, see, for example, this committee's excellent 1989 majority staff "Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil

Rights, U.S. Department of Education," the unmistakable message emerges that civil rights in education has become, at best, a low priority.

We urge this committee to announce, loud and clear, that this message is unacceptable.

Before addressing the particular concerns we have regarding OCR, which when I do, I am going to focus more on the substantive issues of enforcement rather than procedural questions that were raised this morning. Important as they may be, I think they have been aired and would like to get into the substance.

First, I would like to take a moment to review the many equity problems which confront girls and women in education. Let me be crystal clear in this regard: ongoing gender-discrimination in education has a devastating and broad-based impact.

Indeed, it not only detrimentally affects the girls and women—disproportionately racial and ethnic minority group members—who are denied access to the education, training and jobs they need to properly provide for themselves and their families.

Based on the well-documented projection that many of the new jobs which will emerge over the next decade and beyond will go unfilled for want of people with the necessary skills to fill them—all too many of them women—it will also have exceedingly damaging consequences on our economy.

Recognizing the importance of the problem and taking the necessary steps to achieve gender-equity in education must be a national priority. Examples of the many serious and ongoing problems of gender-equity in education: Girls and women at every educational level are substantially under-represented in math, science, computer, and other technical courses and programs.

Major problems of sex-segregation in vocational education programs persist at both the secondary and postsecondary levels with girls and women heavily concentrated in traditionally female, nontechnical and low-wage areas.

Sexual harassment is a problem of major proportion at both the secondary and postsecondary level with women as victims both in their capacity as students and employees of educational programs and institutions.

Gender discrimination in education-related employment, in addition to sexual harassment, remains a serious problem with women concentrated in lower level jobs and receiving lower salaries than their male peers regardless of their job level.

Discrimination against females in education-related sports activities is endemic. Girls and women have substantially fewer opportunities to participate and receive significantly less support than their male peers in virtually every aspect of secondary and postsecondary school athletics, including scholarship assistance.

In addition, women suffer from widespread employment discrimination in education-related athletic programs.

One of the most serious areas of fall out is in sports-related scholarships.

We have serious problems in health care, with discriminatory policies and health programs in many post secondary institutions which fail to cover pregnancy and gynecological care as other services. There are serious deficits in the educational opportunities provided to pregnant and parenting teens.

Indeed, while it is clear that pregnancy and parenting play a major role contributing to female dropout rates, only the most minimal attention has been paid to those very vulnerable women in dropout prevention programs.

Many of the standardized tests used so widely in our education system reflect a serious gender-bias. For example, females score, on average, 60 points lower than males on the SAT in spite of the fact that the SAT is justified as a predicator of first-year college grades and women consistently receive higher grades than their male peers.

As a result of this score differential, women lose out in many of the benefits pegged to SAT scores ranging from college admissions to competitive scholarships. Women receive only one-third of the prestigious National Merit Scholarships which access to gifted and talented programs for junior high school-age students.

Similarly, serious problems of gender-bias pervade the Armed Services Vocational Aptitude Battery which is used by high schools across the country in connection with their vocational education programs.

The wide gender-diverging scores on this test—which apparently has not been validated for uses in connection with the civilian job market—substantially contribute to the channeling of girls and women into traditionally female, non-technical and low-wage jobs.

Finally, the widespread lack of availability of child care effectively deprives many women access to education at both the secondary and postsecondary level—the education they so desperately need to enable them to provide for their families.

Clearly, profound problems of sex-equity run throughout our educational system. The key question for this committee is: What is OCR doing regarding all of these critically important issues?

The unfortunate response is very little. This is the direct result, in my view, of a combination of a failure of leadership and a lack of resources.

The bottom line is that OCR too often fails to use its powers even in the fact of clear violations of Title IX. It has not taken meaningful initiatives to either understand or resolve virtually any of the critical sex equity in education issues facing us today.

In that sense, I would echo Dave Chavkin's testimony regarding with problems dealing with Section 504 enforcement.

A prime example of the first problem of simply failing to enforce the law is found in the area of sex equity in athletics. Probably the best resource for this is a guide to Title IX which the National Collegiate Athletic Association put out. The guide contains internal OCR memoranda and guidelines in great detail to give its member institutions clear guidance on how to avoid creating sex equitable athletic programs and still maintain conformity with OCR rules.

Another example is found in OCR's response to the problem of discriminatory health plans and services offered by colleges and universities.

Approximately 1800 complaints have been filed with OCR dealing with health plans which do not cover pregnancy and/or gynecological services the same as other illnesses and disabilities.

This is a clear violation of the regulations. It is not a subtle, difficult question.

After sitting on the issue for about five years, a review of the sample of these 1800 complaints, or the disposition of them, shows OCR failed to take decisive action to guarantee compliance. Instead of clearly informing colleges and universities they are in violation of civil rights law and what they have to do to come into compliance, they have relied on institutional assurances of compliance without any followup or monitoring to close these cases.

Based on these and other anecdotal experiences with OCR and as an attorney who actively practices in this area, I have no choice but to routinely counsel discrimination victims. In my view such victims will be far better served taking their claims to court with all the burdens and costs, or pursuing state remedies where they exist. To say this is unfortunate begs the question.

Equally troubling is OCR's failure to have mounted any meaningful initiatives in the area I have identified as well as others. Where is OCR, for example, in the important effort to enhance female participation in math, science and computer programs? What is it doing about getting women and girls into nontraditional areas of education? Why hasn't OCR done anything notable in the effort to eliminate sexual harassment in our nation's schools?

Why is it almost invisible in the effort to put pressure on junior and senior high schools to accommodate the special needs of pregnant and parenting students? Why have they left alone the dropout programs? Why has OCR done almost nothing to address the problems faced by victims of multiple discrimination?

Cutting across all of these issues is OCR's failure to have produced or sponsored the research and analysis necessary to understand the nature and extent of the problems, or to produce effective strategies. There is a record of OCR's turning down direct offers of help outside organizations to help put together policies to develop materials to take on some of these issues.

A current example is the problem of widespread noncompliance with Title IX regulations regarding the treatment of pregnant and parenting teens. Even where OCR has addressed in some fashion some of these issues, they have an uncanny knack for missing the point. An example of this is found in the testing area. The Armed Services Vocational Aptitude Battery has not been validated for use with civilian employment. There are sex bias problems in the outcome of those tests.

Some schools, in trying to deal with this problem tried to score the test to develop separate test norms so they can see where girls rank among their peers in these nontraditional areas. It is a controversial practice, but it is a way to try to deal with the problem of the underlying instrument. OCR, in a series of compliance reviews dealing with this test, has totally ignored the problems presented by the use of this test—which is a very flawed test—and has informed these schools that separate sex norming is a violation of Title IX.

Not only has it missed the underlying problem, it ignored Title IX regulations which specifically allow recipients to undertake efforts to help the gender which has been historically excluded from, or unrepresented in certain activities—in this case, nontraditional vocational education.

This narrow approach has had a troubling fallout. You see school administrators shying away from any kind of separate sex program even where, in these cases, it is specifically permitted under the Title IX regulations. A troubling example is an excellent program sponsored by the Girls Clubs, which is designed to help get girls, many of them minority girls, involved in math, science, and technical kinds of programs.

It is a single sex program. Clearly girls have been unrepresented in these areas. School administrators are giving the Girls Club a great deal of problems in running these programs through the schools, even though I think any fair reading of the title and the regulations show these are permissible undertakings.

In remedying these problems, clearly we have to get a confirmed Assistant Secretary for Civil Rights who understands these issues and is committed to developing the policy, research, and backup to take on some of these terribly important issues.

At the same time, Title IX has to be guaranteed the resources to do the job. Meanwhile, until that eventually occurs, we very sincerely commend this committee for keeping the heat on so that at the very least, there is a full and public record of the problems we encounter.

Thank you very much.

[The prepared statement of Ellen Vargyas follows:]

TESTIMONY

BEFORE

COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES

ON

ENFORCEMENT ACTIVITIES OF THE
OFFICE FOR CIVIL RIGHTS
U. S. DEPARTMENT OF EDUCATION

BY

ELLEN J. VARGYAS

ON BEHALF OF

NATIONAL WOMEN'S LAW CENTER
NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

NOVEMBER 28, 1989

STATEMENT OF ELLEN J. VARGYAS
ON BEHALF OF THE NATIONAL COALITION
FOR WOMEN AND GIRLS IN EDUCATION
AND THE NATIONAL WOMEN'S LAW CENTER

My name is Ellen J. Vargyas and I am very pleased to be here today in my dual capacity as Chair of the National Coalition for Women and Girls in Education and an attorney with the National Women's Law Center. The National Coalition for Women and Girls in Education represents over 60 diverse women's, education, and civil rights organizations committed to expanding equity for women and girls in all aspects of education. The National Women's Law Center, a private, non-profit legal organization devoted to developing and protecting women's legal rights, similarly has as one of its key priorities the elimination of gender-based discrimination in education.

While both the Coalition and the Law Center are deeply concerned with the full range of civil rights enforcement, our particular focus is the enforcement of Title IX of the Education Amendments of 1972, the statute which prohibits sex discrimination in education programs and activities which receive federal financial assistance. My testimony will therefore concentrate on issues regarding Title IX although many of the concerns I will voice apply equally to the enforcement of the other civil rights statutes within OCR's jurisdiction. In addition, because I understand that the many procedural problems in OCR enforcement, i.e., compliance with timeframes, avoidance of the Letter of Finding process, etc., are being addressed by other witnesses, I will focus my remarks on the substantive aspects of Title IX enforcement.

It is both timely and important for this Committee to exercise its oversight jurisdiction regarding the Office for Civil Rights in the Department of Education. Extremely serious concerns are raised by the failure of this Administration to have even nominated an Assistant Secretary for Civil Rights, nearly a year into its term. When viewed in combination with the significant decline since 1980 of OCR's budget in real terms and the well-documented and pervasive failures of OCR during that time in handling complaints and conducting compliance reviews, see, e.g., this Committee's excellent 1989 majority staff Report on the Investigation of the Civil Rights Enforcement Activities of the Office For Civil Rights , U.S. Department of Education, the unmistakable message emerges that civil rights in education has become, at best, a low priority. We urge this Committee to announce, loud and clear, that this message is unacceptable.

Before addressing the particular concerns we have regarding OCR, I would like to take a moment to review the many equity problems which confront girls and women in education. Let me be crystal clear in this regard: on-going gender-discrimination in education has a devastating and broad-based impact. Indeed, it not only detrimentally affects the girls and women -- disproportionately racial and ethnic minority group members -- who are denied access to the education, training, and jobs they need to properly provide for themselves and their families.

Based on the well-documented projection that many of the new jobs which will emerge over the next decade and beyond will go unfilled for want of people with the necessary skills to fill them -- all too many of them women -- it will also have exceedingly damaging consequences for our economy. Recognizing the importance of the problem and taking the necessary steps to achieve gender-equity in education must be a national priority.

Examples of the many serious and ongoing problems of gender-equity in education include:

♦ Girls and women at every educational level are substantially underrepresented in math, science, computer, and other technical courses and programs.

♦ Major problems of sex-segregation in vocational education programs persist at both the secondary and post-secondary levels with girls and women heavily concentrated in traditionally female, non-technical and low-wage areas.

♦ Sexual harassment is a problem of major proportion at both the secondary and post-secondary level with women as victims both in their capacity as students and employees of educational programs and institutions.

♦ Gender discrimination in education-related employment, in addition to sexual harassment, remains a serious problem with women concentrated in lower level jobs and receiving lower salaries than their male peers regardless of their job level.

♦ Discrimination against females in education-related sports activities is endemic. Girls and women have substantially fewer opportunities to participate and receive significantly less support than their male peers in virtually every aspect of secondary and post-secondary school athletics, including scholarship assistance. In addition, women suffer from widespread employment discrimination in education-related athletic programs.

- In the area of health care, and despite explicit regulations to the contrary, many post-secondary institutions have failed to provide health coverage for pregnancy and gynecological services on the same basis as other illnesses and disabilities.

- There are serious deficits in the educational opportunities provided to pregnant and parenting teens which have devastating consequences for this particularly at-risk population. Indeed, while it is clear that pregnancy and parenting play a major role in contributing to female drop-out rates, only the most minimal attention has been paid to these young women in drop-out prevention programs.

- Many of the standardized tests used so widely in our education system reflect a serious gender-bias. For example, females score, on average, 60 points lower than males on the SAT in spite of the fact that the SAT is justified as a predictor of first-year college grades and women consistently receive higher grades than their male peers. As a result of this score differential women lose out in many of the benefits pegged to SAT scores ranging from college admissions to competitive scholarships (women receive only one-third of the prestigious National Merit Scholarships) to access to gifted and talented programs for junior high school-age students. Similarly, serious problems of gender-bias pervade the Armed Services Vocational Aptitude Battery which is used by high schools across the country in connection with their vocational education programs. The widely gender-diverging scores on this test -- which apparently has not been validated for uses in connection with the civilian job market -- substantially contribute to the channelling of girls and women into traditionally female, non-technical and low wage jobs.

♦ Research shows that the structure of lessons and the dynamics of classroom interaction, to this day, all too often create an environment alien, if not hostile, to girls. Indeed, patterns of differential treatment sometimes are so deeply ingrained that even teachers who strive to be fair and impartial are not aware of them. The fall-out is seen in the problem areas presented here as well as many others.

♦ Finally, the widespread lack of availability of child care effectively deprives many women of access to education at both the secondary and post-secondary level -- the education they so desperately need to enable them to provide for their families.

Clearly, profound problems of sex-equity run throughout our educational system. The key question for this Committee is: what is OCR doing regarding all of these critically important issues? The unfortunate response is very little. This is the direct result, in my view, of a combination of a failure of leadership and a lack of resources. I would like to emphasize that the problems stem from the top because, clearly, there are many dedicated staff. But they cannot do it by themselves. The bottom line is that OCR too often fails to use its powers even in the face of clear violations of Title IX while it has not taken meaningful initiatives to either understand or resolve virtually any of the critical sex equity in education issues facing us today.

A prime example of the first problem is found in the area of sex-equity in athletics. Apparently totally unmindful of the pervasive historic discrimination against girls and women in sport -- as well as Title IX's specific guarantee of equity in this area -- OCR has repeatedly given its imprimatur to practices assured to maintain females' distinctly second class status in athletics. For example, in response to complaints, OCR has approved the practice -- common to many institutions -- of spending only an insignificant portion of their promotion and advertising budgets on women's sports. It has ruled that it is perfectly acceptable for schools to schedule women's competitions -- but not men's -- in unfavorable time periods. And it has construed the regulations governing equity in athletic scholarships to give post-secondary institutions the broadest possible leeway in favoring male athletes and depriving female athletes of equal access to a free or reduced cost education.

Indeed, in its Guide to Title IX (1988), the National Collegiate Athletic Association cites, at length, OCR decisions and internal guidelines and memoranda which its member institutions can rely on in stopping far short of establishing sex-equitable athletic programs.

Another example is found in OCR's response to the problem of discriminatory health plans and services offered by colleges and universities across the country. Approximately 1800 complaints have been filed with OCR regarding health plans which do not treat pregnancy in the same fashion as other illnesses or disabilities and/or which impose limits on the delivery of gynecological services which do not apply to other health services. Both practices are in clear violation of the Title IX regulations. However, a review of a sample of these complaints demonstrates that OCR has failed to take decisive action to guarantee compliance with these important and straightforward regulations. Instead of clearly informing colleges and universities that they are in violation of Title IX and putting in place an appropriate program -- with meaningful monitoring -- to assure compliance, OCR has simply relied on institutional assurances of compliance without any follow-up to close these cases.

As an attorney actively practicing in the area of Title IX, I have no choice but routinely to counsel discrimination victims to be extremely wary of OCR in pursuing their claims. In my view, such victims will often be better served by taking their claims to court, with all the attendant burdens and costs, or pursuing state remedies where they exist. To say this is unfortunate, begs the question.

Equally troubling is OCR's failure to have mounted any meaningful initiatives in the areas I have identified above. Where is OCR, for example, in the extremely important effort to enhance female participation in math, science and computer programs or vocational training for non-traditional jobs? Why hasn't OCR published guidelines or regulations for eliminating sexual harassment from our nation's schools? Why is OCR nearly invisible in the effort to put pressure on junior and senior high schools to both accommodate the special needs of their pregnant and parenting students and assure quality instructional programs for them? Why has OCR not taken on the drop-out prevention programs which largely ignore this extremely vulnerable population? And why has OCR done virtually nothing to address the very serious problems faced by victims of multiple discrimination such as sex and race or a combination of sex, race and disability? It is well-established that victims of double and triple discrimination face uniquely devastating barriers in the field of education but OCR, although it clearly has the jurisdiction to act, has failed to demonstrate any meaningful presence in this critically important area.

Cutting across all of these issues is OCR's failure to have produced or sponsored the research and analysis necessary to understand the nature and extent of the problems and formulate effective strategies to assure Title IX compliance. Indeed, there is an extremely disturbing record of OCR ignoring independent research regarding the extent of certain sex-equity problems and actually turning down offers of materials and assistance in addressing such problems. A current example includes the issue of widespread non-compliance with Title IX requirements regarding the treatment of pregnant and parenting teens.

Even where OCR has addressed in some fashion these issues of gender-equity in education, it has managed to largely miss the point. A prime example is a series of recent Title IX compliance reviews it has conducted which have addressed questions of standardized testing. Some school districts have attempted to deal with the serious gender-bias problems in the Armed Services Vocational Aptitude Battery discussed above by using separate scores -- or norms -- for the young men and women taking the test. While this practice is controversial and does not solve the underlying problem of a flawed test instrument, its supporters believe that by giving young women -- and vocational education program administrators --a sense of where the young women rank among their peers in non-traditional fields, it may enhance their access into training programs for such fields. Nonetheless, and without even considering the questions presented by the use of the test in the first place, OCR has informed several school districts that this "separate norming" violates Title IX. In my view, what is needed is not a cramped interpretation of the statute -- which totally ignores the explicit, and highly appropriate, recognition in the Title IX regulations that school districts are free to undertake efforts to enhance the participation of girls and women in programs where they have historically had limited opportunities -- but an effort to deal with the far more basic questions presented by the use of the test at all.

This narrow approach has had a very troubling fall-out in the reluctance of school principals and other administrators to permit single sex programs which are explicitly designed to help girls and women overcome the effects of conditions which have resulted in their limited participation in non-traditional areas and are therefore in full compliance with Title IX. A case in point is the Girls Clubs' Operation SMART program -- a program for girls -- which is a national effort to interest and involve girls in math, science and technology. Although there is no question that girls have historically been -- and continue to be -- extremely underrepresented in math, science and technology, many schools have been reluctant to permit such programs based on an erroneous reading of Title IX which has, at least implicitly, been supported by OCR.

In remedying the problems I have identified, a key step must be the appointment and confirmation of an Assistant Secretary for Civil Rights who understands these problems and is committed to addressing them. At the same time, OCR must be guaranteed sufficient resources to do the job. An effective OCR must, at a minimum: undertake, or otherwise sponsor, and disseminate the research necessary to evaluate the extent to which equity in education is being achieved; develop analyses and models for addressing the key issues which I have addressed; identify and publicize approaches that work; provide technical assistance as appropriate; develop a cooperative and productive relationship with others working the field; use the compliance review process to expand an understanding of sex-equity issues rather than simply mirroring complaints which may have been filed; and let civil rights violators understand in no uncertain terms that their behavior will not be tolerated. At the same time it is critical that OCR be held to a stringent standard of reporting on its activities in a fashion that will enable the public to understand what it is -- and is not -- doing. This is all the more important since the reporting requirements which had been imposed in connection with the WEAL and Adams litigation are not currently in effect. Only then can there be truly meaningful oversight.

Meanwhile, we commend this Committee for keeping the heat on so that, at the very least, there is a full and public record of the many problems presented.

Thank you for the opportunity to testify.

Chairman OWENS. Thank you.

Ms. Pamela Monroe Young.

Ms. YOUNG. Thank you very much, Mr. Chairman, and members of the committee. I am, as the chairman identified, Pamela Monroe Young, Legislative Counsel for the Washington Bureau of the NAACP. I am appearing here today instead of the invited witness, Althea Simmons, who unfortunately is sick, and cannot attend the hearing today.

Mr. Chairman, we have asked our regional staff to supply us with some information based on their activities in connection with Title VI and the Office for Civil Rights of the Department of Education. We are presently awaiting the response from the field. So we ask for permission to submit at a later date evidence that we will receive from the field.

Critical to the elimination of discrimination in this country is the unequivocal commitment of government agencies to vigorously enforce the antidiscrimination laws. The importance of vigorous enforcement cannot be overstressed, particularly in this period of trampling of civil rights by the security and its Federal court proteges.

One area of grave concern for the NAACP today is the enforcement activities of the Office for Civil rights. We are tremendously affected when we learn there are efforts to minimize that office's impact through confused and even hostile policy directives, administrative mismanagement, and changes in leadership. Thus, we embrace fully the recommendations of the staff of the Education and Labor Committee, which seek to restore and ensure the effectiveness of that office.

Allow me to elaborate on a few of our concerns, particularly as they pertain to Title VI. It has been suggested in the report on the investigation of the civil rights enforcement activities for the Office for Civil Rights, that the office should conduct more compliance reviews regarding race and national origin issues. We strongly concur with that recommendation.

After all, as pointed out in the report, the Office for Civil Rights was established as a result of the passage of the Civil Rights Act, which we consider to be the major piece of legislation designed to address race discrimination.

Even more compelling in our conclusion that more compliance reviews are in order is the fact that the Office for Civil Rights has inadequately pursued these types of cases. The report tells us that of the issues perceived by the field staff of the Office for Civil Rights are off limits, most were issues involving race discrimination. Those off limit race issues involved a variety of important areas that are described in the report.

Then we are told that it took egregious stories to justify enforcement of the law in those areas. The failure of the OCR to give adequate attention to race based complaints is wholly inconsistent with the mandates of the law before that office and totally unacceptable to the NAACP. Thus, we call for more compliance reviews and complaint investigations which raise issues of impermissible race discrimination. We urge the committee to join us in requesting more complaint investigations as we note that the report refers to the compliance reviews.

Moreover, it is our hope that the recommendation of the report is not proffered to the Office for Civil Rights by that office as a mere suggestion for change in approach. This issue is too important to our association, such that we feel that race focused compliance reviews and complaint investigations must be incorporated in that process of the Office for Civil Rights.

The NAACP also agrees that the Office for Civil Rights should establish time frames for case processing. In light of this history of less than vigorous enforcement by the Office for Civil Rights, the NAACP cannot fully support voluntary compliance with the system of time frames. We recognize that a voluntary system is much too vulnerable to the whims of the Administration.

Further, we can no longer solidly rely on orders of the court—such as the Adams orders—to impose time frames in light of the arguments that the orders by the court intrude upon the function of the Executive Branch and violate the separations of powers doctrine. Thus, we call for more than a volunteer system and concur with the report that definite time frames should be reported in the Federal Register.

Now, we recognize that selecting the proper time frames is a delicate issue. On the one hand, we agree that time frames should be amply flexible to allow thorough investigations of complex, novel or multi-issue cases. They must not be so stringent as to encourage the compromise of a claim by the staff of the OCR.

Suggestions that there is a correlation between the compliance with time frames and the number of cases being closed with no violation are extremely troubling. Equally troubling are those cases where remedies have been determined to be proper following a review, but compromised as a result of deadlines. These circumstances are clearly unacceptable. On the other hand, the NAACP certainly would not want to see deadlines so flexible so as to permit routine extensions of times simply because of a staff person's failure to properly process the case.

We believe, however, that proper time frames can be found if the time frames suggested by the OCR are published in the Federal Register for comments. Then all of those affected will have the opportunity to share their experiences as we seek to identify the ideal, or at the very least, most practical set of time frames.

The NAACP also supports amending Title VII regulations to provide for several things that have been identified in the report. They include time frames for record retention, full relief for victims of discrimination, the posting of notices that nondiscrimination is the law, the issuance of subpoenas where employers have not voluntarily complied with document requests, and the use of a reasonable standard in determining whether there has been a violation.

The requirement of an intense standard to develop a violation, determination of a violation is too stringent. Apparently for the staff of the OCR, what makes this standard even more difficult is that the actual proof required under this standard has not been clearly identified in writing. This makes the process of establishing a violation subject to individual interpretation and decreases the likelihood that a violation will be found.

The standard of reasonable cause, as used under Title VII, in our view, is the more proper standard to be used. Under that standard, the staff would have to determine that there is reasonable cause to believe that the complainant has suffered discrimination rather than making an actual finding of discrimination based on intent. Even courts have permitted complainants to establish discrimination without proof of discriminatory intent, where there has been no statutory requirement of intent.

Moreover, to require the type of investigation to establish intentional discrimination, as suggested by some OCR staff, means a number of other cases of racial discrimination will be put on hold.

We desire full relief for victims, at least comparable to the type of relief offered in Title VIII. Promises of compliance by employers are totally inadequate.

The victim of proven discrimination simply must be made whole. We are also very concerned with the present procedure for issuing letters of findings which cite institutions for violations of the civil rights law. The complaints of the staff regarding the inordinate time taken by the headquarters to review and approve letters of findings tells us that the system is not working. Anything that breaks down the system is unacceptable.

We have learned that in some instances cases are closed instead of being forwarded to the National headquarters for review and approval. We have learned that for some in the field, there is the inference that the National offices do not wish them to submit these letters of findings of violations in light of criticisms regarding the number of letters being submitted.

In our view, this represents a system that is working to the disadvantage of victims in this country. The NAACP is seriously troubled by this practice. Our rights should not be bogged down by the structure and the carelessness of an office.

In concluding, I would like to thank the committee for this opportunity to be heard. The NAACP urges the committee to continue its outstanding review of the OCR so as to ensure that the laws protecting our interests are enforced.

Thank you.

Chairman OWENS. Thank you.

Your additional evidence may be submitted. We will hold the record open for that. You referred to additional material?

Ms. YOUNG. Yes. Thank you very much.

Chairman OWENS. Without objection.

Norma Cantu, the Director of Elementary and Secondary Programs, Mexican American Legal Defense and Education Fund.

Ms. CANTU. On behalf of the Mexican American Legal Defense and education fund, a nonpartisan legal advocacy organization, dedicated to protecting the civil rights of the Hispanics in the United States, I want to thank you for the opportunity to address the issue, the enforcement by the OCR of the civil rights laws of this country. My presentation today will be brief, but I want to emphasize three parts:

First, I want to discuss the importance of having an agency that does in fact enforce the civil rights laws in this country, particularly for Hispanics who need that advocate, who need that Federal agency overseeing their rights.

Second, I want to discuss some observations that MALDEF made concerning the OCR's role in enforcing the laws.

Finally, I will give recommendations for improving the enforcement as it relates to Hispanics.

The history of the OCR has been that it treats Hispanics as an invisible minority. When we heard minority, it means handicapped, it means women, it means blacks, it doesn't necessarily mean Mexican-Americans, Cubans or any other Hispanic group.

MALDEF joined the Adams suit on that point. We intervened when our clients were told that their complaints would be closed because they were under court orders to work on other minorities and other types of cases. We had to step in to be sure the office included Hispanics as a separate and independent ethnic group.

The eighth annual report by the Office for Civil Rights is silent on Hispanics. It doesn't break them down as a separate group. Indeed, it would be easy to conclude from reading that public document that Hispanics did not exist and that is a sad fact because Hispanics do have a problem in securing equal access to education and it is a very serious problem.

Hispanics are characterized by rapid growth, so despite the treatment as an invisible minority, will be a very large invisible minority. Our numbers are estimated at 20 million in the United States. And the figures are growing.

In Brownsville, Texas, they are building an elementary school a month. And where they once had one high school, they have five high schools. This growth has occurred in a 10-year span.

We are characterized by poverty as well. Unlike the median family income for whites, which has increased in the last 10 years, the median income for Hispanic families has dropped by $1600 per family. We see education as the avenue for improving our role in the American society and so we look to agencies like the Office for Civil Rights to open that opportunity.

It is very, very disconcerting to see the activities of the Office for Civil Rights and see how absent Hispanics are. One major area that distinguishes Hispanics from other minorities is our language difficulties. We want to learn English. We are trying to learn English but there are many barriers to that. It is a misnomer that all school districts are trying to help Hispanics learn English. Very few have programs for that.

The responsibility of the Office for Civil Rights under Title VI is to overcome those obstacles and, yes, as we see from a partial response to a FOIA request directed to the Office for Civil Rights, in the last five months there has been 16 law reviews. Law reviews are those special reviews directed at finding out how language minority students are being treated.

Sixteen law reviews in a whole country of 20 million Hispanics is very sparse and it treats that group as though it doesn't exist. In order to overcome language difficulties, we need to overcome racial attitudes.

In Dortnio, it means a screw. It is a small town in west Texas. The school superintendent sent a memorandum to all parents requesting that the parents apply corporal punishment when the children spoke Spanish. They were literally trying to beat the Spanish out of the school children.

It took community pressure and the state agency and Hispanic organizations to cause that superintendent to change his mind that you educate children into learning English. The Office for Civil Rights was not active in that situation. It happened a year ago, not something that happened when we were in school, but it is still happening today.

It is a civil rights issue, not merely a language issue and the Office for Civil Rights should be active in situations such as that.

The insensitivity isn't limited to west Texas. It appears throughout the country and sadly, the Office for Civil Rights is not active in the language issue.

In terms of observations about the Office for Civil Rights when MALDEF filed its first education discrimination cases 21 years ago there was a lot of hostility among the courts. Education was not popular with Federal judges and it required a number of appeals.

It is a basically difficult kind of work to do but it needed to be done. The way you educate judges is you file more cases and the strategy is one of accepting the fact that there will be some confrontations.

The Office for Civil Rights has avoided confrontations. Its practice has been to be as far away as possible from anything that is unpopular or confrontative.

I am not an advocate for confrontation, but when it is dealing with educators practicing the same kind of policies for more than a hundred years sometimes litigation is the only recourse that they will listen to. Sometimes as a matter of last resort, litigation is necessary. It is not avoidable and it is only a litigation tool that some educators will respect.

Like the Office for Civil Rights, MALDEF has relied on Title VI. But the principle legal tool that we rely on to protect children who are non-English speaking is the Equal Education Opportunity Act of 1974. And that is a very important Federal law. It mandates that both local and state governments shall remove barriers to the education of limited English proficient students. MALDEF groups have used this Federal law to cause large school districts and even states to reform the manner that they educate non-English speaking children.

We have seen very little activity by the Office for Civil Rights in using this Federal law. It follows Title VI. It is important because it requires an effects test. MALDEF handled a suit, *Gonez* v. *Illinois State Board of Education*, 7th Circuit Division 1987. That decision plainly stated it is an effects test meaning that the Office for Civil Rights need not prove racial discrimination or any kind of intentional discrimination, and yet, as we were reviewing correspondence after the decision occurred, there are still staff at the Office for Civil Rights who are requiring proof of intent. This makes it very difficult for children to receive any kind of relief if the Office for Civil Rights is requiring a more difficult standard than the 7th Circuit, which many lawyers regard as a conservative circuit, a difficult circuit to win a civil rights victory from.

It is in the area of language that we hope minority children receive the greatest gain from enforcement of civil rights. In Illinois alone with that Gonez case, we helped 40,000 children. I see opportunities for the Office for Civil Rights to help language groups of minority kids with these kind of impact cases but they are absent from that arena and I think that is a major concern.

In terms of recommendations, we recommend that—first of all, we appreciate the tremendous influence that OCR has. It has the capacity to really expand educational opportunities for Hispanics. It has the clout to secure access to information that private groups cannot get, that community organizations cannot get. It can use its power to initiate investigations. It could use its power to compel data collecting. It can use its power to take administrative enforcement action.

In Texas, before OCR showed up, there was no data at all on Hispanics in higher education. We couldn't tell you how many went to college, how many graduated or how many were in the work force. In 1979, for the first time public colleges began to gather that kind of data and OCR wrote up a letter of finding saying they found severe underrepresentation of Hispanics in Texas. They never mailed that letter. They entered into a settlement.

The investigations begin, these letters are drafted, and they are never formalized. But at least the process began in one instance. OCR started the ball rolling with its data collecting power.

The ball has stopped in Texas. OCR has allowed the plan to lapse. There is no more data in Texas. We have no idea how many Hispanics drop out of public colleges in Texas because no longer is the state required to keep collecting that data.

We have no way of forcing public universities because OCR has let the ball stop, and that I think is something in terms of a recommendation. We recommend that OCR use that power more frequently than it is doing at the present time.

We recommend OCR engage in some community outreach efforts to involve the Hispanic community in prioritizing where it does its OCR compliance reviews and where it provides technical assistance services. The Hispanic community should be made aware of the power that the OCR has to collect and use data to target investigations to conduct compliance reviews.

MALDEF recommends that OCR scrutinize state policies and practices as they affect the educational opportunities of minority children. OCR does not have to wait for a Hispanic group to file a complaint.

Individuals are unwilling to file complaints because they fear retaliation. Public information in terms of what the new education reform movement has done and how it has affected minorities—OCR could scrutinize those particularly where standardized tests are being used to keep minorities in low ability tracking to keep them from graduating. OCR can take a more affirmative stance in those areas.

MALDEF recommends the internal review of the uniformity with which OCR uses that Equal Education Opportunity Act. Insistent enforcement of Federal law has missed opportunities to initiate enforcement actions such as the Gomez case where we were able to help 40,000 students. MALDEF recommends that the OCR report to this committee the reason that disproportionately fewer complaints in the category of multiple bases for discrimination are being closed as compared to single bases.

If you will see the Fiscal Year 1988 report, if you only complained about one type of discrimination you are better off with the Office for Civil Rights. If you are a minority female, your file is held in limbo longer. There is no explanation for the report. Or if you are a handicapped female or a handicapped minority, if you are a doubly discriminated person, your file gets held up a lot longer. I don't know why.

The figures in their report show single bases of discrimination are processed. Multiple bases of discrimination are receiving lower priority and it is inexplicable.

MALDEF recognizes the Department of Education budgetary constraints and while we believe that OCR must be funded adequately, we are concerned that no amount of money will make OCR effective if it fails to prioritize its activities in light of the great educational needs of the Hispanic community.

Thank you.

Mr. MINCBERG. I am Elliot Mincberg, Legal Director of People for the American Way. I am here with Jim Lyons and Susan Liss on behalf of the Citizens' Commission for Civil Rights.

During 1988 and 1989, the Citizens' Commission undertook a comprehensive investigation and review of Federal civil rights enforcement activities which culminated in the publication of one nation indivisible, the Civil Rights Challenge for the 1990s.

In conjunction with that review, I was privileged to lead a task force of four education and civil rights attorneys, including Mr. Lyons, who reviewed in particular civil rights activities of the Federal Government in the area of elementary and secondary education. That is an area where there is absolutely no question that the problems of segregation and discrimination are still with us and in some areas may be worse than they ever were.

For example, a 1988 study found that although there are some areas where those problems have lessened, particularly in areas where there have been metropolitan desegregation plans, there are substantial areas of our country today, including many of our major urban areas which more than 30 years after *Brown* v. *Board of Education*, there is no sign that the Supreme Court ever ruled against segregation. That is a decision that should be a priority for the Federal Government, for OCR and for the Civil Rights Division.

Unfortunately, our review as well as the review undertaken by this committee staff found that during the 1980s priority and efforts weren't there. I will not go into detail on all of the findings that we made, many of which have been echoed in the testimony this morning, although I will ask that our written testimony and a copy of the chapter of the report on the subject be made part of the record.

I want to spend a few moments talking about three particular subjects that should concern this committee, OCR, and the Civil Rights Division as we enter the 1990s. They are compliance reviews, the subject of second and third generation problems of segregation, and briefly the subject of nominations to important positions in the area of civil rights. Mr. Lyons will speak briefly in the area of language minority discrimination.

With respect to compliance reviews, there is absolutely no question that OCR must evoke significantly more efforts in that area. You have heard that already today. We understand the problems that OCR may have, but for an agency which many times during the 1980s turned money back to the Treasury unexpended, there is no excuse for not spending more time and effort in the area of compliance reviews, particularly for language minorities and other minorities that are not as able as others to, on their own, come forward with complaints.

OCR's ability and willingness to undertake compliance reviews is critical, but OCR's ability to do so has been handicapped by a number of problems, two of which I want to highlight briefly.

One is the area of the OCR semiannual survey of school districts undertaken ever other year. In the mid-1980s, OCR undertook a number of steps which significantly weakens that survey. It had been intended originally that about every school district in the country would be covered one way or another during the six-year cycle of those surveys. But as a result of changes, even though some corrective efforts were made in 1988, there will be literally thousands of districts not covered at all during the 1982–1988 time frame of that survey. It ought to be an important priority for OCR as we approach 1990 to consider very carefully the extent to which a comprehensive resurvey may be necessary to establish the data base that is going to be required to effectively monitor, both for compliance review purposes and other purposes, the extent of segregation and discrimination in our nation's school districts.

The other point with respect to compliance reviews has to do with selection. In the late 1980s, we found, and the committee staff found as well, that OCR undertook a policy of not reviewing for compliance review purposes some of the districts that may have needed compliance review the most, districts which had been subject to court order or OCR approved desegregation plans.

I notice Mr. Smith referred to a possible pilot project to review one or two districts that had been court ordered desegregation plans.

In our view, if it hasn't been already, the overall policy of not subjecting those districts to compliance reviews ought to be rescinded. Those districts need the compliance reviews at least as much as other districts do and OCR ought to be focusing on that as well.

Both points were well made in the staff December 1988 report, and I was struck, as I read that report and reviewed drafts of our report, how parallel the reports were. Both we and this staff found many of the very same problems that you have already heard about today that plague civil rights enforcement.

The second area is what we might call second or third generation problems of segregation in our nation's public schools, for example, the problem of interdistrict segregation.

As the surveys have found, the most effective and stable desegregated districts in our country are those where desegregation doesn't stop at arbitrary school districts or city lines, but where there is interdistrict desegregation, to address metropolitan wide problems. And in that area it is very important not just that OCR, which doesn't have the authority to institute suits, but also the Civil Rights Division focus some attention on trying to solve those problems.

During the 1980s there have been some interdistrict suits that have been brought in Saint Louis, Kansas City, Milwaukee, and Little Rock but the Federal Government sat on the sidelines, or in the case of Little Rock and to a certain extent in Saint Louis opposed some of the interdistrict relief that was sought.

The priority should be the other way. The Federal Government authorities in the area of civil rights should be looking for ways to promote, not retard, interdistrict desegregation.

In the area of the relationship between housing and segregation, in the late 1970s the Civil Rights Division undertook a landmark suit in Yonkers to push that issue and to bring a suit for education and housing relief based on a combination of segregation in both areas, but since then very little has been done. And in the Little Rock case, there was opposition by the Federal Government to an interdistrict desegregation decree based upon housing violations.

We urged the Federal Government to look again very closely at the often insidious relationship between segregation and education and housing and to take action in that area as well.

In the area of in-school segregation, an area that is both OCR and Civil Rights Division responsibility, our report found very little attention being focused on that very serious problem. Even in school districts, which on paper may be desegregated, in practice at the school level the degree of segregation may be so severe as to make desegregation in name only but not really in practice.

We urge both the Division and OCR to focus some real attention on this problem and to make sure that the civil rights survey gives them timely and efficient information in that area.

Another third generation type problem is the area of faculty desegregation. This is an area where a number of school districts around the country have on their own or prompted by court order taken some steps in the right direction. But, again, we have not found the Federal Government pushing in the right direction.

In some instances, we have found them pushing in the wrong direction, like one in Prince George's County where the NAACP and the Prince George's County School Board entered into a consent decree to provide faculty desegregation, and one of the few suits that the Justice Department filed in the 1980s was a suit designed to upset that and to retard progress.

From my discussions in school districts around the country, well beyond Prince Georges County, a lot of school districts are worried about voluntary desegregation efforts in faculty and elsewhere. They are worried about what will happen in the Federal Government, and we urge the Federal Government to move to the right direction as we enter the 1990s.

That brings me to the area of nominations to the two key positions we have been referring to today. I don't have to tell this committee that there has not yet been a single nominee submitted for the position of assistant secretary for civil rights at the Department of Education. Since the rejection of Mr. Lucas there has not been a nominee submitted for the position of head of the Civil Rights Division of the Department of Justice. That means as we enter the decade of the 1990s, the two most important civil rights positions with respect to education and perhaps with respect to civil rights in general in the Federal Government will not have people appointed to them by the President and confirmed by the Senate, and that is a situation that we urge this committee to continue to send a message must be rectified. There simply must not be nominees submitted, but nominees that are experienced and committed to restoring the vigorous bipartisan tradition of civil rights enforcement that we have seen in the past and which we hope to see as America approaches the 21st Century.

With that, I will turn the mike over to Mr. Lyons briefly.

[The prepared statement of Eliot Mincberg follows:]

STATEMENT OF ELLIOT M. MINCBERG, LEGAL DIRECTOR OF PEOPLE FOR THE AMERICAN WAY, ON BEHALF OF CITIZENS' COMMISSION FOR CIVIL RIGHTS

My name is Elliot M. Mincberg, Legal Director of People for the American Way in Washington, D.C. In 1988-89, on behalf of the Citizens' Commission for Civil Rights, I led a task force of four education and civil rights lawyers who conducted comprehensive research and analysis for the Commission concerning federal civil rights enforcement with respect to elementary and secondary education since 1981. On behalf of the Commission, I am pleased to accept the invitation of the Committee to testify concerning the enforcement activities of the Office of Civil Rights of the Department of Education (OCR) and related subjects.

The Commission's work concerning civil rights enforcement in elementary and secondary education focused on the two agencies with primary responsibility in this area: OCR and the Civil Rights Division of the Department of Justice. The results of our investigation were published as Chapter VII of the Commission's 1989 report, One Nation, Indivisible: The Civil Rights Challenge for the 1990s. A copy of Chapter VII is appended to this statement.

As this Committee is aware and as our report found, both OCR and the Division had a proud, bipartisan history during the 1960s and 1970s of contributing significantly to effective civil rights enforcement and combatting segregation and discrimination in education. As America approaches the 1990s, however, our report found that the problems of segregation and discrimination continue to plague our nation's public schools. Most alarmingly, moreover, our investigation revealed that federal civil rights enforcement in education deteriorated dramatically in 1981-88, contributing to the tragic increase in the twin problems of school segregation and inequality which our country has witnessed since 1981. The remainder of this statement will summarize our findings and recommendations with respect to civil rights enforcement in education, as well as commenting briefly on OCR in 1989 and beyond.

Findings concerning civil rights enforcement in education

Our findings concerning civil rights enforcement in education focused specifically on OCR and on the Civil Rights Division. With respect to OCR, our findings closely paralleled those contained in the December, 1988 Committee staff report on Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights. We found that during the 1980s, OCR's complaint processing efficiency declined, and that OCR has consistently been unable to meet the timeframes called for in the applicable orders entered in the Adams litigation. Yet at the same time OCR has failed to utilize all funds appropriated to it for enforcement activities.

With respect to OCR compliance reviews, we found that such reviews had declined during the 1980s, despite their importance as an enforcement mechanism. We found that as a result of changes adopted in 1984, OCR significantly reduced the usefulness of its semiannual civil rights survey of school districts, a key tool begun in 1968 which has been used to decide which districts to review for civil rights compliance. We found that selection of sites for compliance reviews has been limited by questionable OCR policies, such as a 1987 policy which stated that such reviews should not be undertaken in districts subject to desegregation plans approved by courts or OCR. We found that OCR failed to use its authority effectively under the federal magnet school program to gather and evaluate potentially key information to help determine civil rights compliance. We also found, as the Committee staff report concluded, that OCR had required an "intent" standard to find a civil rights violation, despite the fact that the courts and OCR itself had previously recognized that practices which have a discriminatory effect may violate civil rights laws and warrant remedial action, further impeding enforcement.

In the area of obtaining relief for civil rights violations, we found that OCR's performance was particularly poor. Timely relief of any sort was obtained in only a fraction of the cases where OCR had made findings of discrimination. In many other cases, OCR did not even reach the stage where findings are issued, but instead resolved complaints without findings by accepting virtually any agreement offered regardless of its substance. Even in cases where violations were found, OCR accepted numerous settlements since 1981 which relied on general promises or assurances and simply failed to correct violations of law. Contributing to inadequate enforcement, we found, were such practices as issuing letters of findings to districts indicating that civil rights violations had been corrected based only on assurances of future performance without on-site monitoring, and the disbanding of OCR's national Quality Assurance Staff, which had previously served as an internal check on OCR enforcement by finding errors and problems.

We also found serious OCR inadequacies during 1981-88 with respect to remedying continuing problems of in-school segregation, enforcing prohibitions against sex discrimination, and ensuring equal opportunity for language-minority students. As detailed in Chapter VII of the Commission's report, these problems extend beyond inadequate OCR enforcement, and include serious deficiencies in Department of Education policies and funding priorities, particularly with respect to equal opportunity for limited English proficient and female students.

In addition to problems in OCR and the Department of Education, our research revealed a serious deterioration in enforcement during the 1981-88 period by the Civil Rights Division of the Department of Justice. During that period, the filing of new lawsuits to challenge school segregation and inequality of educational opportunity in elementary and secondary education by the Division had slowed to a virtual crawl, in marked contrast to the vigorous enforcement record previously established by the Division during both Republican and Democratic administration. As with OCR, the Division failed during this period to seek and implement effective remedies for illegal segregation and denial of equal educational opportunity. This included improper opposition to the use of mandatory student reassignment plans where necessary; reliance on purely voluntary measures and opposition to effective and enforceable relief; refusal to seek and outright opposition to necessary funding for effective remedies; refusal to seek systemwide desegregation relief; reversal of previous opposition to tax exemptions for discriminatory private schools; and improper attempts to terminate enforcement litigation. Indeed, the Division has even attacked legal principles which Division attorneys themselves helped establish under earlier Republican and Democratic administrations, and actually switched sides in several cases to defend those who the Division itself had previously charged with discrimination.

Recommendations for action

Our analysis led to a series of recommendations designed to help restore our nation's bipartisan commitment to vigorous civil rights enforcement. With respect to OCR and the Department of Education, in summary, those recommendations included the following:

In the area of processing of complaints, OCR should seek to expend properly all funds appropriated for its enforcement activities and request additional funding as needed. OCR should institute additional monitoring and develop guidelines to avoid improperly suspending or delaying the processing of OCR complaints and help promote compliance with the Adams timeframes, any changes in which should be accomplished through notice-and-comment rulemaking.

With respect to initiating and conducting compliance reviews, OCR should return to the methodology used prior to 1984 in its vocational and civil rights surveys, and should determine promptly whether a comprehensive national resurvey is needed for 1990. OCR should also seek to develop methods to increase the number, role, and quality of compliance reviews, such as removing restrictions on conducting reviews of districts which are subject to court or OCR-approved desegregation plans. OCR should develop policies to use its authority under the federal magnet school assistance program to help determine compliance with civil rights laws, including establishment of a policy to utilize an "effects test" in clearing districts to receive magnet funds.

With respect to obtaining relief for civil rights violations, OCR should develop specific guidelines for its enforcement policies. Guidelines should focus on avoiding delays; ensuring that settlements actually correct violations; prohibiting reliance on general assurances of good faith without effective monitoring, and abolishing the use of "violations corrected" Letters of Findings and instead returning to the prior practice of issuing such Letters with findings of fact and conclusions of law before negotiating corrective action. OCR should also return the quality assurance program to the national level to perform its previous functions.

OCR should focus attention on the issue of in-school segregation, particularly in formerly segregated school districts. OCR should consider sponsoring general research into particular types of tests used by many districts to assign students to classes where concerns have been raised about discrimination against minorities.

OCR should once again aggressively enforce complaints of sex discrimination and establish comprehensive monitoring and compliance review procedures with respect to sex equity and sex discrimination. The Department should promote the development of model sex equity programs and provide increased funding for initiatives to combat voluntarily sex discrimination in education.

In the area of ensuring equal educational opportunity for limited English proficient students, the Department should take specific steps to improve federal counts and estimates of language-minority populations. The Department should seek significant additional appropriations for Bilingual Education Act programs, including expanded support for Developmental Bilingual Education. OCR should significantly increase compliance review activity in this area, and OCR and the Department should act to provide additional specific guidance to districts concerning civil rights responsibilities with respect to language-minority students.

Conclusion: OCR in 1989 and Beyond

As of this date, we have very little to report concerning the implementation by OCR of our recommendations to improve civil rights enforcement. No doubt OCR has been slowed significantly by the fact that no nominee has yet been selected for Assistant Secretary for Civil Rights, the head of OCR, although 10 months have already passed since this Administration took office. We urge that a nominee experienced in and committed to vigorous enforcement of civil rights laws be selected promptly. A nominee with similar characteristics should also be selected as soon as possible to head the Civil Rights Division at the Department of Justice. These two key civil rights positions cannot be permitted to remain vacant as we enter the 1990s.

The Citizens' Commission has provided its report both to OCR and the Civil Rights Division, and we are anxious to meet with officials at these agencies to discuss how our recommendations can be implemented effectively. We and other members of the civil rights community hope and trust that it will be possible to work with OCR and the Division to restore our nation's bipartisan commitment to vigorous and effective civil rights enforcement in education in the 1990s. This Committee's December, 1988 report is similarly an important step towards that end; we urge OCR to implement the report's recommendations and we urge this Committee to continue to review OCR's activities and to work with OCR to help accomplish this important goal.

Thank you again for your invitation to testify. Please let us know if we can provide the Committee with any other information that would be useful in its activities.

One Nation, Indivisible:

The Civil Rights Challenge for the 1990s

Edited by
Reginald C. Govan
and William L. Taylor

Report of the
Citizens' Commission
on Civil Rights

CHAPTER VII

FEDERAL CIVIL RIGHTS ENFORCEMENT AND ELEMENTARY AND SECONDARY EDUCATION SINCE 1981

by Elliot M. Mincberg
Naomi Cahn
Marcia R. Isaacson
James J. Lyons

I. The Problems of Segregation and Inequality of Educational Opportunity

For more than a generation, a key purpose of federal civil rights enforcement has been to combat segregated education and inequality of educational opportunity. As America approaches the 1990s, however, these problems continue to plague elementary and secondary education in our nation's public schools.

A comprehensive report by the National School Desegregation Project in 1987 concluded that there are "clear signs" of "deepening isolation of children growing up in inner-city ghettos and barrios from any contact with mainstream American society."[1] According to a twenty-year study of racial segregation in large school districts published by the National School Boards Association in 1988, black students are usually highly segregated from whites in big city districts, with no significant progress in desegregation since the mid-1970s and there are "severe increases in racial isolation in some areas."[2] For example, in about a fifth of our nation's largest urban districts, three out of every four black students attend highly segregated schools which are over 90 percent minority.[3] Segregation is growing worse for Hispanics, who have seen constantly increasing racial isolation in virtually all parts of the country.[4] Almost two-thirds of all minority students are enrolled in schools which are predominantly minority, and over 17 percent attend classes which are over 99 percent minority.[5] Although segregation has been reduced in some school systems, particularly where metropolitan desegregation plans have been implemented, significant areas remain today "where there is simply no sign that the Supreme Court ever ruled against segregation."[6]

In addition, inequality and inadequacy of educational opportunity remain a devastating problem for minority students. Schools serving predominantly minority pupils "continue to do much worse than white schools in academic achievement, graduation rates, and other key measures of academic opportunity."[7] Minority students are twice as likely to drop out of school as white students.[8] As many as 40 percent of minority children are functionally illiterate.[9] Overall, the largely separate education provided for minority students "has not become equal in the United States of the 1980s," and there is "no indication that the severe inequalities that led minority families and organizations to institute the early desegregation cases have yet been resolved."[10] Instead, a "great many black students, and very rapidly growing numbers of Hispanic students, are trapped in schools where more than half the students drop out" and "where the average achievement level of those who remain is so low that there is little serious pre-collegiate instruction."[11] In this context, effective and vigorous civil rights enforcement is more crucial than ever in the area of elementary and secondary education.

II. Background of Federal Civil Rights Enforcement and Policy in Elementary and Secondary Education Prior to 1981

Two agencies have primary responsibility for federal civil rights policy and enforcement with respect to elementary and secondary education: the Civil Rights Division of the Department of Justice (the Division) and the Department of Education, particularly the Office of Civil Rights (OCR). As a result of the Civil Rights Act of 1964, the Department of Justice obtained specific authority to file lawsuits in federal court to challenge segregation and inequality of educational opportunity, and to intervene in pending federal suits. *See* 42 U.S.C. § 2000c-6, 2000h-2. In 1966, the Justice Department announced a full-scale attack on segregated education, filing forty-four new lawsuits and thirty-five motions for enforcement or further relief in cases that were pending.[12]

Although the precise level of enforcement activity by the Division has varied, substantial numbers of new complaints and supplementary enforcement motions continued to be filed during both Democratic and Republican administrations during the 1960s and 1970s. As of 1974, for example, there were two hundred pending desegregation-related cases by the Division, affecting about five hundred school districts.[13] New lawsuits were filed against many school districts in 1975-81, including both northern and southern school systems. In addition to helping combat segregation and inequality of opportunity in the specific districts in which they were filed, the cases initiated by the Justice Department between 1965 and 1980 contributed to the development of a significant body of school desegregation law.[14]

In contrast to the Justice Department, which pursues its enforcement activities through the courts, OCR enforcement is through the administrative process. Specifically, OCR is responsible for enforcing federal statutes which prohibit discriminan, based on race, sex, national origin, handap, or age, in all education programs and activities which receive funding from the federal overnment, including almost sixteen thousand cal school districts.[15]

OCR uses two methods to investigate alleged violations of federal civil rights laws: complaint investigations, which are conducted in response to complaints received from individuals and groups, and compliance reviews, which are initiated by OCR based upon information gathered in OCR surveys. When OCR finds a violation of the law through either administrative procedure and the violator is not willing to correct the problem voluntarily, OCR can refer the case to the Civil Rights Division, which can sue the violator in court, or OCR can seek a cut-off of federal funds to the violator through a proceeding before an administrative law judge. *See* H. Rep. 458 at 2-3.

In the 1960s, when OCR's enforcement activities began pursuant to Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, OCR's efforts focused largely on school systems in the South which had failed or refused to achieve desegregation. Hundreds of administrative actions were begun to defer or terminate funds, in addition to lawsuits brought by the Civil Rights Division. These efforts produced dramatic results. By 1966, desegregation had begun in virtually every rural southern school district, most of which had previously been totally segregated. Although 98 percent of black children in the eleven states in the deep South still attended all-black schools in 1964, fewer than 9 percent attended such all-black schools by 1972.[16]

In 1969, however, the attorney general and the secretary of HEW, who was then in charge of OCR, announced a new policy which minimized the number of cases in which federal funds would be cut off due to civil rights violations, and which postponed previous administrative deadlines for desegregation in southern school systems. *See* H. Rep. 458 at 4. In 1970, a federal court complaint was filed in the case of *Adams v. Richardson*, contending that as evidenced by the 1969 policy change, OCR had begun systematically to fail to enforce prohibitions against federal assistance to segregated and discriminatory schools and other institutions. *Id.* at 4-5.[17]

The *Adams* litigation has had a major impact on OCR enforcement activities. In 1972-1977, the court in *Adams* issued a series of orders finding that OCR was failing to carry out its enforcement responsibilities and requiring specific relief. This relief included orders mandating that OCR begin administrative enforcement proceedings against specific school districts and other institutions and requiring that OCR handle complaints and compliance reviews according to specified timeframes in order to prevent serious delays which were impeding effective enforcement.[18] Although *Adams* originally focused on OCR enforcement with respect to racial segregation and discrimination against blacks, the case was expanded to include discrimination issues with respect to Hispanics, women, and disabled students, in 1976 and 1977.[19]

In 1977, OCR and the plaintiffs in *Adams* negotiated a settlement and consent decree which incorporated the previously ordered timeframes and adopted reporting and other requirements.[20] Efforts to comply with the consent decree between 1977 and 1980 were generally successful, and the backlog of pre-order cases was almost eliminated.[21] While problems with civil rights enforcement remained, as of 1980 both OCR and the Civil Rights Division appeared committed to effective action with respect to civil rights enforcement in elementary and secondary education.

III. Federal Civil Rights Enforcement and Policy in Elementary and Secondary Education Since 1981: Findings and Conclusions

A. Summary and Overview

Since 1981, federal civil rights enforcement in elementary and secondary education has deteriorated dramatically. The Division has filed only four new suits challenging segregation or inequality of educational opportunity in more than seven years, and has begun no new enforcement action at all in such critical areas as metropolitan desegregation. Instead, it has focused on trying to dissolve injunctions against discrimination and to dismiss desegregation cases filed before 1980; in fact, the Division has tried to dismiss desegregation cases against more than twice the number of school districts than it has filed new suits since 1981. OCR has similarly failed to comply with judicial and administrative guidelines for processing complaints, debilitated important civil rights surveys, avoided conducting compliance reviews, and even resorted to backdating documents and persuading victims to drop complaints in order to appear to meet enforcement deadlines. OCR and the Department of Education have also failed to fulfill their responsibilities in enforcing laws prohibiting sex discrimination and in ensuring that educational opportunities are provided to limited English speaking students.

Since 1981, federal civil rights enforcement in elementary and secondary education has deteriorated dramatically

Both the Division and OCR have failed to pursue effective remedies for discrimination, often agreeing to settlements which effectively permit civil rights violators to police themselves with no further monitoring and enforcement. Contradicting Supreme Court precedent, the Division has opposed remedies which require desegregation or utilize busing, even when the school districts involved support those remedies, and has failed to seek necessary financial support for magnet and other alternative programs. The Division has attacked legal principles which Division attorneys themselves helped establish under previous Republican and Democratic administrations. Indeed, the Division has even switched sides in pending Supreme Court cases, leading it to attack voluntary desegregation in Seattle, oppose efforts to provide educational opportunities for children of undocumented aliens, and support IRS tax exemptions for discriminatory private schools.

In short, as the United States Commission on Civil Rights concluded in 1983, the federal government has "reversed enforcement policies pursued for nearly a quarter of a century by Republican and Democratic administrations alike."[22] This reversal has done much much more than simply fail to promote desegregation and equality of educational opportunity. Instead, the evidence suggests that school desegregation and inequality have grown worse during the 1980s.[23] As the United States moves into the 1990s, it is critical that the national bipartisan commitment to effective civil rights enforcement in education be restored.

The remainder of this analysis specifically reviews civil rights enforcement in elementary and secondary education by the Division and by the Department of Education during the 1980s. Analysis of the Division's activities focuses on initiation of new cases, seeking remedies for violations of the law, and termination of litigation, including such issues as metropolitan desegregation, busing, and magnet schools. Analysis of the Department of Education and OCR concentrates on the complaint review process, civil rights surveys and compliance reviews, combating segregation within schools, ensuring compliance with laws against sex discrimination, and the issue of bilingual education.[24] Specific recommendations are included with respect to each subject, and are summarized in Section IV.

B. The Civil Rights Division

1. Initiation of new cases

The filing of new lawsuits to challenge school segregation and inequality of educational opportunity in elementary and secondary education has slowed to a virtual crawl since January, 1981. The Division has filed only four new cases since that time, including only three desegregation cases, and one case which was nothing more than a filing in court--along with a consent decree--to embody the terms of a settlement with OCR at the school district's request.[25] This is substantially less than the number of new cases filed during any similar previous seven-year period; indeed, it is less than one-tenth the number of cases filed during 1966 alone.

The Division leadership has claimed that the small number of new cases is due to the progress that has been made in school desegregation since *Brown v. Board of Education*.[26] The dismal statistics discussed in Section I above concerning racial segregation in the 1980s, however, make it clear that much more remains to be done. In the twelve months prior to January 1981, moreover, four new desegregation suits were started, but the Division filed no new complaints at all for the next two years and only three in seven years.[27] As of 1985, the Division had eleven investigations of possible complaints pending --more than twice the total number of complaints filed in over seven years.[28] Congressional reports and statements by former Division attorneys, moreover, indicate that the Division has failed or refused to act on a number of cases referred to it by OCR and has slowed or abandoned investigations and possible complaints across the country, such as in Rochester, New York and Albuquerque, New Mexico.[29]

The Division's failure to undertake new enforcement activity is particularly troubling with respect to the issue of metropolitan desegregation. The evidence is clear that interdistrict school desegregation involving both central cities and suburbs offers the best hope for achieving stable, effective integration.[30] The Division had supported metropolitan desegregation in earlier years, as in Indianapolis, and was prepared to file an interdistrict suit in St. Louis in early 1981.[31] Yet the Division failed to file such a complaint in St. Louis, refused to take a position on the issue when the NAACP and the city school board pursued desegregation claims against the St. Louis suburbs, and then opposed portions of a settlement which called for voluntary student transfers between the city and the suburban districts.[32] The Division abandoned an earlier effort to seek a metropolitan remedy in Houston, Texas following a lower court dismissal of its case in 1981.[33] In Milwaukee, where the city school board and the NAACP filed suit against suburban districts in 1984, the Division remained uninvolved.[34] And in

Little Rock, Arkansas, where private plaintiffs and the city school board sought metropolitan remedies, the Division filed an unsuccessful *amicus curiae* brief opposing any interdistrict relief whatsoever.[35]

Another area where new enforcement activity should be explored concerns the interaction between school and housing segregation. The Supreme Court has long recognized that segregated housing contributes to segregated schools and vice versa, and a number of courts have ruled that government actions which lead to segregated housing can provide the basis for school and housing desegregation remedies.[36] Indeed, since 1981, the Division has continued to pursue the landmark case of *United States v. Yonkers*, in which segregative government-subsidized housing policies formed a large part of the basis for housing and school desegregation relief ordered by the Court.[37] The Division has not begun other schools-housing cases, however, and opposed an interdistrict remedy based on housing segregation in the *Little Rock* case.[38] School segregation remains a serious problem in many metropolitan areas, and discrimination in housing has undoubtedly helped cause and reinforce such segregation. Both with respect to individual municipalities and metropolitan areas across the country, the close interaction between school and housing segregation offers a promising avenue for breaking down the barriers of racial isolation.

Accordingly, it is *recommended* that the Division significantly increase its efforts to investigate and file new cases to combat the continuing problems of school segregation and inequality of educational opportunity, focusing its efforts on cases attempting to achieve metropolitanwide desegregation, and to pursue the link between segregated housing and segregated schools.

2. Seeking remedies for illegal segregation and denial of educational opportunity

Prior to 1981, the Division itself helped establish some of the key principles which govern the provision of relief against school segregation. Chief among these is the rule that a defendant guilty of segregation must take immediate, affirmative steps to eliminate all vestiges of segregation. *Green v. County School Board*, 391 U.S. 430, 438, 439 (1968). While voluntary transfers and magnet schools may be utilized as part of a desegregation remedy, the Supreme Court has specifically ruled that a purely voluntary "freedom of choice" approach with no enforcement mechanisms is "unacceptable" where there are alternatives offering "speedier and more effective" relief. *Id.* Such remedies can and should include compensatory and remedial education programs to help eliminate the damaging educational vestiges of segregation. *See Milliken v. Bradley*, 433 U.S. 267 (1977). They must also include consideration of the use of student reassignments and busing where necessary and appropriate, the Court has held, since desegregation plans "cannot be limited to the walk-in school." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 29 (1971).

Since 1981, the Division has refused to follow these principles. This refusal consists of much more than opposition to busing by the Division's leaders. It includes active opposition to and refusal to seek *any* remedy which specifically requires desegregation, reliance on purely voluntary plans regardless of their effectiveness, refusal to seek necessary funding to support voluntary plans and compensatory programs, and refusal to seek systemwide desegregation remedies. These policies contradict the bipartisan civil rights enforcement record prior to 1981 and have contributed significantly to the lack of progress in combating racial isolation and inequality of educational opportunity.

a. Opposition to use of mandatory student reassignment plans

The Division's leadership has unequivocally repudiated the use of mandatory student reassignment plans or "busing" to help achieve desegregation under all circumstances.[39] This policy directly contradicts the Supreme Court's pronouncement that any "absolute prohibition against use of [mandatory reassignment]--even as a starting point--contravenes the implicit command of *Green v. County School Board* . . . that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of*

Educ. v. Swann, 402 U.S. 43, 46 (1971). As the Court has recognized, in many school systems "it is unlikely that a truly effective remedy could be devised without continued reliance upon [busing]." *Id.*

This judicial recognition is confirmed by experience. Where properly planned and implemented, mandatory reassignment plans have succeeded in promoting effective desegregation across the country. A 1987 survey showed that the states and metropolitan areas with the "greatest integration of black students typically have extensive court orders requiring busing."[40] In Charlotte, North Carolina, where the Supreme Court specifically approved mandatory reassignment in 1971, residents have called the city's desegregated school system "one of the nation's finest" and Charlotte's "proudest achievement."[41] As demonstrated by experience in Charlotte and other cities, as well as by national polling data, most parents support such plans once they have begun and problems of "white flight" due to desegregation are generally minimal.[42] Just as with the many more students who are bused for reasons unrelated to desegregation, such plans do not involve excessive time or distance and protect students' health, safety, and welfare.[43] Indeed, compelling evidence shows that black student achievement has significantly improved in desegregated schools, that white students' achievement has either improved or stayed the same, and that desegregation plans can also improve employment opportunities and housing integration.[44] The courts have used mandatory transportation remedies only where necessary and where other methods of desegregation have failed.[45] When properly used, however, such plans achieve successful and effective desegregation "that is unattainable through other means." H. Rep. 12 at 19.

Since 1981, however, the Division has gone even further than refusing to ask for or support such remedies. It has actively opposed and sought to limit or terminate such plans, even where the school district affected disagrees with the Division. A prime example was in Seattle, where the local school district had *voluntarily* begun a reassignment plan to promote integration. When a statewide initiative was passed in the 1970s prohibiting such plans, the Division initially joined the school district in successfully arguing to the lower courts that the initiative was unconstitutional. The lower courts found that the initiative created an impermissible racial classification by allowing busing for all purposes except desegregation, was tainted by discriminatory intent, and made it impossible for Seattle to effectively eliminate segregation.[46] When the case reached the Supreme Court in 1981-82, however, the Justice Department switched sides, rejected its own prior arguments, and argued against Seattle that the initiative was constitutional.[47] The Supreme Court rejected these arguments and ruled that the initiative was unconstitutional, thereby upholding the Seattle plan.[48]

A series of other cases further exemplifies the Division's recent policy. In the Nashville case, the Justice Department sought Supreme Court review of an appellate court decision refusing to permit major modifications to a desegregation plan.[49] The Supreme Court declined review of the Nashville case without a single dissenting vote, rejecting the government's apparent attempt to urge reconsideration of *Swann* and other cases upholding the use of mandatory reassignment.[50] In cases in Beaumont, Texas and Kansas City, Kansas, the Division dropped appeals of desegregation orders it had previously filed largely because, according to the former Division attorney assigned to the cases, the Division did not want to seek further remedies involving mandatory student reassignments.[51] The result was that many black students in these districts remained in segregated schools with no remedy.[52]

A particularly disturbing example was in East Baton Rouge, Louisiana. In that case, the Division again switched sides and urged a lower court to replace a mandatory desegregation plan with voluntary measures. This was despite the fact that the Division had previously advocated a more extensive plan than the one it sought to replace, and that the Division's own consultant agreed that the voluntary plan would be less effective than the existing remedy and would allow racial segregation to continue.[53] Mandatory remedies were ordered in East Baton Rouge only after twenty years of resistance by the school board to desegregation, and a specific finding by the court that the board's conduct was a classic example of the "litany of failure by local white elected officials to discharge their constitutional responsibilities."[54] The local board was thus understandably encouraged when the Division appeared to take its side in opposing mandatory desegregation, even to the extent of reassigning Division attorneys who had previously argued for extensive desegregation in the case.[55] Yet the board failed even to approve the voluntary measures suggested by the Division and continued instead to oppose desegregation, forcing the Division to hastily withdraw its suggestions.[56]

When the nation's chief civil rights enforcement office switches sides and appears to reward the recalcitrance of local officials, as in East Baton Rouge, the result can only be to rob the Division of its credibility with the courts and encourage the very "failure of leadership, courage, and wisdom on the part of local officials" which necessitated mandatory remedies in the first place. *Davis, supra*, 514 F. Supp at 871. Similarly, by removing even the threat of the Division's most effective remedies against districts guilty of segregation, the Division's rigid antibusing policy eliminates much of the incentive to undertake voluntary efforts and further encourages defiance. By giving comfort to continued resistance to desegregation and by failing to promote effective and responsive local leadership, the Division makes it much more difficult for desegregation to succeed. Even more than the impact of its actions in particular cases, it is this more subtle effect of the Division's policies which may most seriously damage effective civil rights enforcement in education. It is accordingly *recommended* that the Division end its rigid opposition to the use of mandatory transportation as a remedy in school desegregation cases, and return to its previous policy of considering the use of all available remedies and supporting relief which will be most effective in individual cases.

b. Reliance on purely voluntary measures and opposition to enforceable relief

Since 1981, the Division has sought to rely solely on voluntary methods in desegregation cases, such as magnet schools to encourage integrative transfers, without enforcement or backup mechanisms if such methods do not achieve desegregation. This is in accord with the philosophical position of the Division's leadership that a school district's obligation is simply to refrain from hindering whatever degree of integration may naturally occur on its own, and that the Division will not seek to "compel children who do not want to choose to have an integrated education to have one," even where there has been a history of enforced segregation.[57]

This philosophical view, however, has been expressly rejected by the Supreme Court. Where a defendant is guilty of unconstitutional school segregation, damaging the education of minority students and engendering racial segregation and divisiveness in a community, it cannot simply step aside and shift to parents and children the responsibility to desegregate voluntarily. Nor can it fulfill its obligations by simply behaving in the future in good faith and without discriminatory intent. Instead, the Court has held, the defendant has the "affirmative duty" to take "whatever steps might be necessary" to actually eliminate segregation and its vestiges to the maximum extent practicable.[58] Since the Supreme Court rejected "freedom of choice" plans in *Green*, the courts have consistently held that purely voluntary magnet or other programs cannot be the sole technique used to remedy segregation.[59]

Magnet schools and similar programs which offer incentives for voluntary integrative transfers can play an important role in achieving desegregation. When used alone and with no provision for enforcement, however, research demonstrates that such voluntary programs are ineffective.[60] In addition, serious questions about equity and fairness have been raised in districts employing magnet schools. A recent report has concluded that in several cities, magnets have produced stratified school systems that effectively consign low-income and at-risk students to inferior, nonmagnet schools with few resources and little chance of excellence.[61]

The Division has relied heavily on purely voluntary measures in litigating and settling cases with school districts since 1981. An early example was in Chicago. In 1980, the Division and the Chicago school board entered into a consent decree which required the district to propose a comprehensive desegregation plan in March, 1981, to be implemented beginning in September. The board missed the first deadline and, in response to a court order, filed a subsequent plan. That plan postponed most compliance until 1983, and defined a 70 percent white school as adequately desegregated, even though the district as a whole was only 20 percent white. The Division initially objected to the plan. One month later, however, the Division reversed its position, withdrew its opposition, effectively agreed to permit the district to remain in violation of the consent decree, and asked the court to refrain from even ruling on the adequacy of the school district's proposed guidelines.[62] Not surprisingly, desegregation in Chicago has not succeeded, and the Chicago public schools remain among the most segregated in the country.[63]

Even more demonstrative of the Division's policy have been the consent decrees and settlements which the Division has entered into beginning in 1981. For example, in 1984 the Division simultaneously filed and entered into a consent decree to settle a case against the Bakersfield, California school district. OCR had previously found that the district had committed pervasive, intentional acts of discrimination in segregating black and Hispanic students, and referred the case to the Division because it concluded that an effective remedy would require a court order mandating some reassignment and additional busing of students.[64] Yet the Division agreed to a settlement involving no such remedies, relying instead only on magnet schools and other voluntary measures. In addition, the consent decree did not call upon the district to achieve any specific level of desegregation or provide for any effective method of enforcement. Instead, it simply called for a "good faith effort" by the district, and provided that the case could be dismissed within three years if such an effort was made, regardless of the degree of segregation remaining in the schools.[65] The Division specifically acknowledged that *Bakersfield* could comply with the decree even if its schools continued to be segregated.[66]

The *Bakersfield* consent decree was severely criticized as ineffective and a "blueprint" for segregation.[67] In fact, the district's first report on the plan revealed that all ten schools which were intentionally segregated and racially identifiable before the plan continued to be racially identifiable after implementation, including three schools which remained 90 percent or more minority and one school which became even more segregated after the plan began.[68] Even as of 1987-88, four years after the *BakersfieldD plan was adopted, five of these ten schools remain racially* identifiable.[69] Nevertheless, *Bakersfield* has announced that it intends to seek termination of the consent decree and dismissal of the case, and virtually identical consent decrees relying solely on voluntary measures and containing no effective enforcement or desegregation standards were entered by the Division in other cases, such as in *Lima, Ohio*, and *Phoenix, Arizona*.[70]

No one representing the victims of segregation could object to the consent decrees in cases like *Bakersfield* and *Phoenix*, since only the Division and the school districts involved were parties to these cases. Indeed, the Division has sought to prevent civil rights groups from participating in its cases; for example, the Division opposed participation by the NAACP Legal Defense Fund on behalf of minority children in the *Charleston* case, even though the defendant school board itself did not oppose intervention by a black parents' group, and the head of the Division reportedly instructed line attorneys to make "those bastards . . . jump through every hoop" to become party to the case.[71] In the Hattiesburg, Mississippi case, however, where a plaintiff representing minority students was in the case and objected to a proposed consent decree between the Division and the school district similar to those in *Bakersfield* and *Phoenix*, the court of appeals specifically rejected the consent decree as inadequate.[72] This decision confirms the serious problems raised by the Division's reliance on totally voluntary, unenforceable methods, particularly in cases where no other parties are present to defend the rights of minority school children.[73]

In fact, the Division has even opposed totally voluntary desegregation measures because some effective method of enforcement was included. In the St. Louis case, the NAACP, the city school board, and the suburban districts all agreed on a plan in 1983 to settle claims of metropolitan segregation. The plan called for totally voluntary transfers of minority city students to suburban districts, but also allowed the plaintiffs to go back to court against suburbs which had not achieved agreed-upon levels of integration in five years. Even though all transfers were totally voluntary and no mandatory reassignment was involved, the Division opposed the plan, arguing that a "good faith" effort should be enough and that no further method of enforcement should be provided.[74] The court rejected the Division's arguments and approved the settlement, which has led to significant numbers of interdistrict transfers and has not required further enforcement action against any suburban districts.[75]

As the St. Louis case illustrates, voluntary desegregation measures can succeed where they are part of an overall desegregation effort and where there are enforcement or back-up measures to encourage voluntary methods to work. Otherwise, however, purely voluntary measures are ineffective, potentially unfair, and in violation of accepted principles of desegregation law. It is accordingly *recommended* that the Division employ magnet schools and other voluntary desegregation methods, both in settling and litigating cases, only where they are part of an overall desegregation effort including effective enforcement or backup measures and will not impair educational opportunities of children in nonmagnet schools. Division policy should seek to effectuate the principle established by the Supreme Court that affirmative steps must be taken to eliminate school segregation and its effects to the maximum extent practicable.

c. Refusal to seek, and opposition to, necessary funding for effective desegregation and equality of educational opportunity

In order to be successful, magnet schools and similar voluntary measures require additional funding for enhanced educational programs and facilities as well as transportation to attract parents and students to desegregated schools.[76] In addition, the Supreme Court has recognized that segregation has damaging long-run educational consequences, which may require compensatory and remedial educational programs as well as physical desegregation to achieve full relief.[77] The Division itself has similarly recognized that inequalities in the "tangible components of education" between minority and white students should be remedied.[78]

In fact, however, the government has been unwilling since 1981 to provide or support the provision of the funding necessary to make magnet and other voluntary programs work, even though it has advocated such voluntary measures, and to offer equal educational opportunity.[79] In Chicago, for example, the settlement plan relied heavily on magnet schools. When necessary federal funds to support such programs were eliminated, Chicago had to go to court for an order freezing education department funds until the money promised by the federal government was provided. A congressional bill to provide such funding was vetoed, and the court had to virtually hold the Justice Department in contempt before the government agreed to provide money for the plan.[80]

An example relating to equal educational opportunity outside the specific context of desegregation is presented by *Plyer v. Doe*, 457 U.S. 202 (1982), in which the Supreme Court ruled that it was unconstitutional for Texas to deny a free public education to children of undocumented aliens. Prior to 1981, the Division participated in the case at the lower court level and argued successfully that Texas' actions unconstitutionally denied equal opportunity to such children. When the case reached the Supreme Court after 1981, however, the Justice Department abruptly changed its position and stated that it would express no view on the constitutionality of Texas' conduct. As one former Division attorney has explained, in addition to failing to support equal educational opportunity, this switch in position "damaged the Department's credibility both with the Court and with the public."[81]

In a growing number of cases in recent years, minority citizens and city school boards have sought funding from state governments for compensatory programs, magnet schools, and other measures, based upon the Supreme Court's ruling in the *Milliken II* case that courts can require such remedies to be funded by state governments which have contributed to school segregation.[82] This development offers an important method for helping provide effective remedies for school segregation and inequality of educational opportunity, which are often beyond the fiscal capacity of local school districts.

Rather than supporting or seeking such relief, however, the Division has opposed it. In St. Louis, for example, the Division objected to a lower court order which required Missouri to help fund voluntary magnet programs, educational improvements for minority students, and voluntary integrative transfer programs.[83] The Court of Appeals questioned the propriety of the Division's actions, rejected its arguments, and approved state funding.[84] In the *Yonkers* case, the NAACP and the local board have filed a similar claim seeking state participation in necessary compensatory and remedial education programs, but the Division has opposed the claim.[85]

In general, federal funding for compensatory education and desegregation has decreased significantly since 1980. For example, between 1980 and 1986, spending for the Chapter I compensatory education program decreased by 23 percent, serving 500,000 fewer students.[86] As of 1987, Chapter I served two million fewer students than in 1980.[87] The administration successfully persuaded Congress in 1981 to eviscerate the Emergency School Aid Act, reducing the funds available for magnet schools and other desegregation programs.[88] For 1987 and 1988, the Department of Education requested a rescission of all $24 million appropriated to provide desegregation assistance under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c.[89]

Adequate funding is critical to success, particu-larly with respect to voluntary desegregation measures which the Division has supported. It is accordingly *recommended* that the Division and the government support the provision of funding necessary for magnet schools and other voluntary desegregation programs and for compensatory and remedial education programs. In particular, the Division should seek and support remedies pursuant to *Milliken II* which require state governments to help fund magnet, compensatory, and remedial programs to assist in remedying the vestiges of segregation.

d. Refusal to seek systemwide remedies

In *Keyes v. School District No. 1*, 413 U.S. 189 (1973) a case concerning segregation in the Denver public schools, the Supreme Court established the important principle that where a substantial portion of a school district is segregated, there is a presumption that racial imbalance in other schools in the district is due to segregation, and that a systemwide remedy should be ordered encompassing all schools. As the Court explained, "common sense dictates" that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions," and systemwide relief is often necessary to eliminate all vestiges of such segregation.[90]

Nevertheless, the Division's leadership repudiated *Keyes* in 1981. It announced that it would not utilize the *Keyes* presumption in initiating litigation and would "seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts."[91] Although it is difficult to trace specific Division actions to this shift in policy, former Division attorneys and other observers have suggested that it has played an important role in the decision not to seek further relief in the Kansas City case and in the low number of new cases begun by the Division.[92]

In addition to these problems, the *Keyes* policy shift has potentially critical implications for achieving effective relief in desegregation cases. Ordering remedies in only part of a system where segregation has occurred may well encourage residential instability and "white flight" within a district by effectively permitting those opposed to desegregation to transfer elsewhere. Meaningful desegregation may often be impossible if only a fraction of a district is involved, particularly in light of the effects of segregative acts throughout a district, as the Supreme Court has recognized. Accordingly, it is *recommended* that the Division seek systemwide relief in its cases in accordance with *Keyes*, and that the Division fully utilize the principles of *Keyes* in initiating and conducting school desegregation litigation.

e. Reversal of opposition to tax exemptions for discriminatory private schools

Problems arose concerning private schools which discriminated against minorities and served as havens for "white flight" from desegregation, particularly as desegregation of public schools increased in the 1960s. In 1971, the Supreme Court affirmed the issuance of an injunction prohibiting the IRS from granting tax exemptions to such discriminatory private schools. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd*, 404 U.S. 997 (1971). Although the injunction in *Green* formally applied only to schools in Mississippi, the IRS had extended the policy to all private schools.

When several private schools later challenged the IRS policy, the Justice Department vigorously defended it, and the lower courts ruled that the IRS policy properly denied tax exemptions to discriminatory private schools. In the most publicized of its shifts on civil rights issues, however, the Department reversed itself when the case reached the Supreme Court and took the position that the IRS did not have the authority to deny such tax exemptions. This was despite the vigorous opposition of many career attorneys and the government's own characterization of the schools as "blatantly discriminatory."[93] In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court specifically rejected the Department's new arguments and upheld the IRS' policy. *Id.* at 585 n.9. Once again, the Department's credibility and reputation were severely damaged.[94]

Although the specific issue in *Bob Jones* is unlikely to recur, the issue of discriminatory private schools warrants continued attention in the context of the Division's future desegregation efforts. In some areas, private schools may still be utilized to attempt to avoid desegregation. The courts have specifically noted, for example, that segregation may be fostered by state laws which facilitate transfers to private schools through such methods as subsidizing transportation costs.[95] States such as Ohio have adopted rules to try to combat such problems.[96] It is accordingly *recommended* that the Division support methods at the state, local, and federal level to combat discrimination by private schools and to prevent the use of private schools to avoid desegregation, including requesting court orders in desegregation cases litigated by the Division.

3. Termination of litigation: the issue of unitary status

Once a court has found illegal segregation in a school district, the Supreme Court has ruled, the court should retain jurisdiction over the district until it has desegregated and achieved "unitary status."[97] While the definition of unitary status continues to evolve on a case-by-case basis, the Court has indicated that in order to be unitary, a district must eliminate the vestiges of segregation to the maximum extent practicable with respect to student and teacher assignment, school facilities, and other aspects of its operation.[98] The Court has also suggested that such vestiges may include the lingering educational deprivations to minority students caused by segregation, and that school segregation may also contribute to residential segregation.[99] Ordinarily, a school district itself seeks a declaration of unitary status, and removal of court jurisdiction, when it believes that it has desegregated and wishes to operate without court supervision.

Since 1981, however, several important shifts in Division policy have occurred with respect to the issue of unitary status. In accord with its view in cases like *St. Louis* and *Bakersfield*, the Division specifically argued in the Denver case, for example, that a school district's good faith implementation of a desegregation plan, no matter how ineffective, should be enough to achieve unitary status and end a court's remedial supervision.[100] The court in Denver did not accept this position, which is flatly inconsistent with the Supreme Court's holding that compliance with desegregation is measured by the effectiveness of a remedy, not the degree of good intentions.[101] It is accordingly *recommended* that the Division adhere to the principle that a school district can be declared unitary only if it has actually eliminated all vestiges of segregation to the maximum extent practicable, including harmful educational and residential segregative effects of school segregation.

The Division's policy shift has gone even further, however. In a number of school districts in Georgia, against which the Division had previously filed desegregation suits, the Division has itself taken the burden of starting proceedings to have the school districts declared unitary and to dismiss injunctions against further discrimination. This is despite the fact that none of the districts involved requested such action, that complaints with OCR have recently been filed against several of the districts, and that most of the districts themselves have opposed the proposed action after objections were filed by the minority plaintiffs participating in the cases.

Specifically, in late 1987, the Division contacted a number of districts which were defendants in the *United States v. Georgia* litigation filed in 1969. After initial implementation of desegregation plans, those districts had been operating pursuant to an injunction issued in 1973 prohibiting future segregation or discrimination and placing the cases on the Court's inactive docket subject to reactivation if necessary.[102] Without consulting the plaintiffs representing black students in the districts, the Division proposed that stipulations be filed dismissing the districts altogether. A number of districts agreed. On February 3, 1988, the Division wrote to the Court submitting such stipulations calling for the cases to be dismissed against eight specific school districts. On the same date, the Division notified the private plaintiffs of its actions for the first time, sending them a copy of the proposed stipulations it had filed.[103] On February 23, 1988, without the consent of the plaintiffs, the Division formally asked that the Court enter the stipulations and dismiss the cases within thirty days.[104]

The private plaintiffs objected, noting that they had not been consulted earlier, that no supporting brief had been filed by the Division as required by local rules, and that no discovery and court proceedings had ever been held to determine that the districts were in fact unitary.[105] Research also revealed that complaints of discrimination had recently been filed against several of the districts with OCR, and that OCR had issued a finding in 1987 that one of the districts had discriminated against black students by assigning them improperly to racially identifiable classes.[106] Within weeks, most of the districts withdrew their agreement to cooperate with the Division in light of the plaintiffs' objections and requests to begin discovery proceedings.[107] One district specifically noted that it had initially agreed to cooperate because the Division had indicated, apparently without foundation, that there were no objections by the private plaintiffs to dismissal of the cases.[108]

Despite the fact that most of the school districts themselves no longer agreed, the Division has persisted in its position. In fact, the Division has even rejected a compromise suggested by the court and agreed to by the plaintiffs and a number of the school districts, under which the cases would be dismissed but the injunctions against segregation and discrimination would remain in effect.[109] The Court has derided the Division's position, noting that it is "totally inconsistent with the old adage 'if it ain't broke, don't fix it,'" and has ruled that the Division may continue to press its claims only if the Division--which initially sued the Georgia districts--now agrees to represent these defendants without expense in all discovery and other proceedings.[110] The issue remains pending as of this date in *United States v. Georgia*, but the Division has clearly indicated that it is interested in initiating similar proceedings in other cases.[111]

This latest action by the Division raises serious problems. In *United States v. Georgia* alone, the Division has sought to end desegregation cases against more than twice the number of school districts that it has filed new cases against in over seven years. There is no reason why districts themselves cannot initiate dismissal proceedings where appropriate, and no reason why the Division should use its scarce resources to do so where the districts themselves do not. The Division should not support a determination of unitary status with respect to districts against which there are recent or unresolved complaints of discrimination, and should not agree to a unitariness finding without even consulting all parties. In addition, there is no reason to oppose continuing injunctions against discrimination and segregation as in *United States v. Georgia*, since such measures may well deter future violations and make it easier to obtain relief if they do occur. Indeed, one appellate court has ruled that even after a district has been declared unitary, it must demonstrate that changed circumstances warrant modifying or eliminating an injunction calling for desegregation.[112]

Accordingly, it is *recommended* that the Division should return to its previous practice of not initiating attempts to have a school district declared unitary, and thus dismiss desegregation claims against it. The Division should consult specifically with OCR and all parties to a case before deciding what position to take with respect to a request to declare a district unitary or dismiss a case, and should not support such a request where there are recent or unresolved complaints of discrimination, or vestiges of segregation, which can be eliminated by further action. Where cases are to be dismissed, the Division should explore the possibility of keeping in place injunctions which prohibit future discrimination or call for the continuation of desegregation plans where necessary. The Division should also support the principle that where an injunction calling for desegregation has been entered, the defendant must bear the burden of proving changed circumstances sufficient to justify modifying or eliminating the injunction.

Following such recommendations, as well as the other recommendations in this section, can help restore our nation's bipartisan commitment to vigorous civil rights enforcement in education through the Civil Rights Division.

C. The Department of Education and the Office of Civil Rights

1. Processing of complaints

One of OCR's major activities is the handling of complaints of discrimination against individual school districts and institutions. Although the number of such complaints has declined during the 1980s, OCR's complaint processing efficiency has also declined, and OCR has consistently been unable to meet the timeframes called for in the *Adams* order.[113] In fact, in 1987, a House subcommittee found a "nationwide scheme" in OCR offices to backdate documents and persuade victims to drop discrimination complaints in order to appear to meet the *Adams* timeframes.[114]

In addition to scarce resources, several causes of these problems have been suggested. Initially, OCR has apparently failed to use all funds appropriated for its enforcement activities; for example, over $20 million appropriated between fiscal years 1980 and 1985 was either returned to the Treasury or spent on activities not related to OCR operations.[115] It is accordingly *recommended* that OCR seek to expend properly all funds appropriated for its enforcement activities and request additional funding as necessary.

In addition, complaint processing has been slowed and disrupted by placing complaints on hold in many cases. For example, a 1986 OCR review revealed that officials in five OCR regional offices routinely delayed processing of cases because of reasons such as alleged unavailability of witnesses, even where in fact there was no adequate basis for such delays, and that monitoring of this process was inadequate.[116] In a number of instances in the early 1980s, OCR suspended processing of complaints altogether in cases in which OCR general policy changes were under consideration.[117] It is accordingly *recommended* that additional monitoring and guidelines be instituted to avoid improperly suspending or delaying the processing of OCR complaints and to help promote compliance with the *Adams* timeframes. This may include modifying or providing additional flexibility in meeting such timeframes in some types of cases, such as complex, multi-issue, multiparty cases. Any changes in the *Adams* timeframes should be accomplished through notice and comment rulemaking by the Department. Efforts should also be made to improve the efficiency of case processing where possible without compromising quality.[118]

Reports indicate that OCR enforcement activity both with respect to complaint investigations and other efforts is hampered by the lack of clear, written policy guidance to regional offices.[119] Accordingly, it is *recommended* that OCR promulgate and distribute policy directives on civil rights enforcement issues on a timely basis consistent with applicable law, to OCR regional offices and the general public.

Another possibility may be for OCR to develop relationships with state civil rights agencies to help handle, under OCR supervision and guidelines, some categories of complaints. Attempts at joint federal-state handling of civil rights complaints have succeeded on a limited basis with respect to OCR and the EEOC, particularly with respect to individualized and relatively routine and repetitive complaints.[120] In addition to helping cope with the complaint workload, such measures could help OCR concentrate more resources on compliance review activities which, as discussed in Section 2 below, can potentially provide much more effective enforcement by OCR. Federal-state activities in the civil rights area must be conducted carefully, however, since there is a serious danger of improper federal reliance on state agencies which may be unreliable.[121] Accordingly, it is *recommended* that OCR analyze and develop proposals for possible joint OCR-state handling of individual complaints now processed by OCR.

2. Initiating and conducting compliance reviews

There is strong evidence that complaint investigations by OCR are generally a less effective means of civil rights enforcement than compliance reviews started by OCR itself. OCR has found that compliance reviews produce twice as many remedies and benefit six times as many discrimination victims as complaint investigations.[122] In addition, such reviews are critical in enforcing the rights of poor, undereducated, and non-English speaking persons, who are least likely to file complaints but often most likely to suffer from discrimination.[123] Despite the decline in complaints during the 1980s, however, compliance reviews also declined, and still remain a "small part of OCR's enforcement program.[124] In 1982, for example, OCR conducted reviews covering only about 8 percent of districts or institutions which were "apparently in severe noncompliance" with civil rights laws.[125]

In deciding which school districts to review for civil rights compliance, OCR has previously relied heavily on its semiannual civil rights surveys of school districts begun in 1968, which collect information on such subjects as the racial makeup of schools and classrooms, assignments to gifted and special education classes, and disciplinary actions. From 1978 through 1982, the surveys were conducted so that all districts with enrollments over three hundred were surveyed comprehensively at least once during the six-year cycle, with districts of high interest surveyed every two years, minimizing the burden on school districts but providing complete and useful data for OCR.[126]

In 1984, however, OCR changed the civil rights survey and seriously reduced its usefulness. It abandoned its 1978-82 survey strategy, using instead a stratified random sampling of districts and allowing large districts to sample only some of the schools within their systems. These changes mean that the survey will miss thousands of schools and school districts, making it extremely difficult to select targets for compliance reviews effectively.[127] For example, even though OCR has eliminated the large district sub-sample procedure and sought to include more districts not surveyed recently in 1988, it is estimated that about two thousand districts surveyed in 1978-82 will be bypassed in the six-year period through 1988, and that about seven thousand mostly small districts will not have been included since 1976.[128] A comprehensive resurvey of all school districts may be needed by 1990 in order to restore the usefulness of the data base.[129]

In addition, failing to survey high interest districts every two years makes it quite difficult to monitor districts which warrant special attention. OCR also altered its vocational education survey, in 1984, in a manner which seriously impairs its usefulness, by including schools over which OCR has jurisdiction or which are not vocational schools and omitting schools which are needed to provide useful data.[130]

Selection of sites for compliance reviews has also been limited by questionable OCR policies. In a 1987 memorandum to its regional offices, OCR stated that compliance reviews should not be undertaken in districts which are subject to court or OCR-approved desegregation plans, and discouraged compliance reviews of institutions requesting technical assistance from OCR.[131] Such policies leave hundreds of districts, including many which have committed civil rights violations in the past, effectively exempt from compliance reviews.[132]

OCR has also failed to use its authority under the federal magnet school program effectively to gather and evaluate potentially key information to serve as a further guide for determining compliance with civil rights laws. In order to receive federal funds to support magnet schools under the program, school districts must be carrying out a court-ordered or voluntary desegregation plan and must provide assurances of nondiscrimination, which OCR has the authority to evaluate.[133] Yet OCR has failed to use its authority to request information from school districts on civil rights compliance beyond the information previously submitted by the districts themselves, thereby neglecting a "legitimate tool for encouraging voluntary compliance with civil rights laws."[134] Moreover, a 1988 review of OCR pre-grant reviews, under the magnet program by the NAACP Legal Defense Fund suggested that OCR had cleared the Pittsburgh district to receive magnet funds despite an OCR regional office's own finding that Pittsburgh had discriminated in faculty assignments.[135] The same review indicated that OCR had improperly used an "intent" standard in clearing districts to receive magnet funds, despite the fact that the courts and OCR have previously recognized that practices which have a discriminatory effect may violate Title VI and justify OCR remedial action.[136] OCR officials had indicated that another review of Pittsburgh would take place, and that OCR was developing a policy to implement use of an "effects test" for magnet program clearance purposes, but no action had been taken as of early October, 1988.[137]

It is accordingly *recommended* that OCR return to the methodology used prior to 1984 in its vocational and civil rights surveys, and determine whether a comprehensive national resurvey is needed for 1990. In conjunction with improving the complaint investigation process, OCR should also seek to develop methods to increase the number and role of compliance reviews as part of the OCR enforcement process. Selection of compliance review sites should be based on qualitative criteria such as OCR survey data rather than random selection. OCR should also remove restrictions on conducting compliance reviews of districts which are subject to court or OCR-approved desegregation plans, or have requested technical assistance from OCR, and should study other ways to help prevent potential conflicts between OCR's enforcement and technical assistance functions. OCR should also develop policies to use its authority under the federal magnet school assistance program to gather and evaluate data effectively to determine compliance with civil rights laws, including establishment of a policy to utilize an "effects test" in clearing districts to receive magnet funds. Compliance reviews should generally be systemwide rather than focusing on particular isolated programs.

3. Obtaining relief for civil rights violations

Perhaps the most persistent criticism of OCR, particularly since 1981, has been its failure to obtain effective remedies, even in cases where OCR has made findings of discrimination. Although OCR found two thousand violations of law as a result of compliance reviews or complaints from 1981 to mid-1983, it began only twenty-seven administrative proceedings which can lead to fund cutoff or deferral and referred only twenty-four additional cases to the Division for prosecution.[138] Relief was slow or non-existent even in a number of these fifty-one cases due to delays by OCR or the Division.[139] In many other cases, OCR has not even reached the stage where findings are issued, but has instead resolved complaints without findings by accepting virtually "any agreement which results in a withdrawn complaint, regardless of the substance of the agreement," a practice which the Division and OCR staff have severely criticized.[140] Even in cases where findings have been issued, OCR has accepted numerous settlements since 1981 which rely on general promises or assurances and otherwise, simply fail to correct violations of law.[141]

For example, in 1976, OCR had found that the New York City schools had violated Title VI by discriminating in the hiring and assignment of minority teachers. A 1977 settlement agreement provided that New York would be ineligible to receive federal funds until it adequately remedied the violations, and federal money was accordingly withheld until 1982. In 1982, however, OCR agreed to a new settlement with New York which effectively allows the city to maintain virtually all-white faculties in many schools, to continue to assign less qualified personnel to predominantly minority schools, and to take no steps to remedy discrimination in promoting women to positions as principals and assistant principals.[142]

Another example is Peoria, Illinois, where, in 1984 OCR found that a number of schools were racially isolated in violation of Title VI. As OCR staff negotiated a possible settlement with Peoria, it was operating under guidelines that the consent decree in the *Bakersfield* case should provide the basis for settlements in cases like Peoria. As discussed above, there are serious deficiences in the remedy in *Bakersfield*. In Peoria, however, the director of OCR rejected the recommendations of his own Policy and Enforcement Service and accepted a settlement which was even weaker than in *Bakersfield*, since it did not encourage voluntary integrative transfers or include substantial compensatory education programs for racially isolated schools.[143] As the former director of OCR's Policy and Enforcement Service concluded, the settlement was "certainly not" adequate to address violations of Title VI.[144]

Several specific problems appear to be contributing to inadequate OCR enforcement. OCR has adopted a practice of issuing letters of findings to districts indicating that their civil rights violations have been corrected based only on assurances of future performance and without on-site monitoring, a process that has been severely criticized.[145] In addition, OCR has disbanded its national Quality Assurance Staff which, prior to its elimination, had found numerous errors and problems in OCR enforcement practices.[146]

It is accordingly *recommended* that OCR develop and implement guidelines for its enforcement and settlement practices. These guidelines should focus on determining which type of enforcement should be used in particular cases, avoiding delays when cases are referred to the Division, ensuring that settlements in cases where violations are found actually correct violations, prohibiting reliance on assurances of good faith or future actions in settlements without monitoring to ensure actual performance, and ensuring that resolution of cases prior to the issuance of findings are in accord with applicable laws and regulations. OCR should abolish the use of "violation corrected" Letters of Findings and return to its prior practice of issuing Letters of Findings with findings of fact and conclusions of law before negotiating corrective action. OCR should also return the quality assurance program to the national level to perform its previous functions of assessing the quality of OCR work, and assuring consistent implementation of policy.

4. Remedying in-school segregation

As more and more court decisions have required school districts to assign children of all races to each of their schools, attention has focused on ensuring that segregation does not occur within schools. Particularly in systems with a history of segregation, some schools have used testing and ability grouping to assign students to racially isolated classrooms and perpetuate segregation.[147] The problem is particularly serious because of persistent evidence that tests used by many school districts are biased against minorities.[148]

Although in-school segregation is within OCR's jurisdiction, OCR's response to the problem has been inadequate. Some information on in-school segregation is available via the civil rights survey, but the survey questions on the subject have not been updated since the 1970s and may miss serious problems. Despite findings of racially identifiable classrooms in a number of cases, moreover, OCR has accepted vague assurances that efforts would be made to avoid discrimination or has indicated that it will continue to monitor the situation.[149] In one case involving Dillon County, South Carolina, OCR had made three findings that ability grouping was being used to perpetuate segregation, but took no action until the 1983 *Adams* order led to a referral of the case to the Division. When the Division declined the case, OCR delayed any enforcement action for another two years until prodded by a House Subcommittee.[150] One former OCR official reported in 1985 that OCR considered dropping ability grouping cases altogether.[151]

It is accordingly *recommended* that OCR focus attention on the issue of in-school segregation, particularly in formerly segregated school districts. OCR should consider sponsoring general research into particular types of tests used by multiple school districts to assign students to classes as to which concerns have been raised of discrimination against minorities, which can be used to help identify and take action with respect to districts with problems of in-school segregation.

5. Enforcing prohibitions against sex discrimination

Sex discrimination in elementary and secondary education is a continuing and serious problem. While sex equity problems may not be as visible as problems of racial discrimination, since public schools are generally not segregated by sex, there is nonetheless a striking disparity in the opportunities and achievement of boys and girls throughout elementary and secondary education. Boys and girls participate unequally in sports, they score differently on the pre-college aptitude tests, they choose very different college and vocational education concentrations, and they are even treated differently in the classroom.

In 1982, only 35 percent of the more than 5.1 million high school athletes were girls.[152] This figure remained unchanged in 1985-86. One of the primary reasons for this disparity is that opportunities for girls are limited; for example, there are 25,000 less high school sports teams nationwide for girls than for boys.153 Boys and girls continue to express very different preferences for majors in college; 10.6 percent of high school girls want to major in the physical sciences, while 34 percent of high school boys choose them.[154] Although boys outscore girls on the SAT, the Education Testing Service (the producer of the SAT) has admitted that the SAT underpredicts the grades of college women.[155] In 1986, girls' scores were, on the average, sixty-one points below boys' scores.[156] Such discrepancies seriously damage opportunities for female high school students to go to college and obtain merit scholarships.[157]

In high school vocational education, women are 13 percent of engineering students, but 90 percent of the allied health professions.[158] One of the few areas in which girls outperform boys is in the high school drop-out rate, where the rate is slightly higher for boys;[159] but males who do not graduate from high school have a much higher employment rate than females who do not graduate.[160] Boys are more likely than girls to be suspended from school, but they also receive more teacher attention than girls.[161] The evidence suggests that such discrepancies are not caused by differences in abilities or preferences between boys and girls, but instead are attributable primarily to such problems as biased testing, differences in opportunities and resources, and improper channeling by educational authorities.[162]

Similar discrepancies exist with respect to school administrators and teachers. Although 84 percent of elementary school teachers are female, only 52 percent of high school teachers, 26 percent of elementary school principals, and 6 percent of high school principals are female. Women constitute only 7 percent of all school superintendants, although 70 percent of all teachers are female.[163]

Despite the serious nature of sex equity problems, federal financial support and enforcement efforts over the past seven years have declined dramatically. Indeed, "funding and support for equity-related issues have nearly disappeared at the federal and state levels. Equity is not merely out of fashion in the Department of Education--it has been declared an enemy."[164]

The primary vehicle for federal enforcement of sex equity in education is Title IX of the Education Amendments of 1972, which prohibits all aspects of sex discrimination in education that receive federal assistance.[165] The prohibition has been interpreted broadly to apply to admissions, athletics, employment, vocational education, child care, and financial aid.[166] As discussed earlier, for financial aid distributed by the Department of Education, it is the responsibility of OCR, in conjunction with the Department of Justice, to enforce federal laws such as Title IX. The federal government's investigation and resolution of sex discrimination complaints, however, has experienced a profound decline since January 1981.[167] During the first six years of the Reagan presidency, "[t]he word [went] out, very clearly, that the Office for Civil Rights finds aggressive enforcement of [Title IX] to be unacceptable."[168] The Justice Department's record appears, if anything, to be worse.[169] Nor has the Department of Education adequately supported programs to combat sex discrimination.

The same problems that have affected enforcement of other civil rights laws have also affected enforcement of Title IX. Initially, OCR has not developed policies that promote sex equity, and the effectiveness of its compliance-related activities has declined dramatically over the past seven years. For example, OCR has provided inadequate guidance to regional offices on how to process sex equity cases. A 1984 internal OCR report expressed concern that the regional offices had insufficient guidelines on how to conduct complaint investigations or compliance reviews in interscholastic cases at the elementary and secondary school level.[170] But the Assistant Secretary of Civil Rights was unable to recall whether OCR had taken any corrective actions as a result of this report.[171]

Administrative enforcement actions have also been lax. In the past, after OCR investigated a district and found a Title IX violation, it issued a letter of finding setting out in detail the violations. However, OCR policy has been not to issue the letter, but instead to find the schools in compliance, and then agree with the district on future compliance actions.[172] Not only is it difficult for the community to monitor these "agreements," but also school districts learn that Title IX violations are not likely to be punished. To make matters worse, OCR compliance reviews and monitoring are "spotty."[173] OCR has even pressured complainants to drop the complaints they have filed with OCR.[174]

In addition to OCR's lackadaisical enforcement efforts, another serious setback to enforcement of Title IX was the Supreme Court's decision in *Grove City v. Bell*.[175] Prior to *Grove City*, if an educational institution received money from the federal government, it could not discriminate.[176] In *Grove City*, however, the Supreme Court limited the coverage of Title IX (and the prohibition against sex discrimination) to only the specific program or activity which received federal funds.[177] The Department of Education ultimately interpreted *Grove City* rigidly, narrowing the coverage of Title IX. "Immediately after the *Grove City* decision, [OCR], by its own count, closed, limited, or suspended sixty-three claims because of the lack of direct federal funding. That was just the beginning."[178]

Initially, OCR had interpreted *Grove City* somewhat narrowly so as to preserve broad OCR jurisdiction with respect to elementary and secondary education. In a July, 1984 analysis of *Grove City*, the Assistant Secretary for Civil Rights stated that as to those school districts that receive Chapter 2 funds, "there is a presumption that all of [the district's] programs and activities are subject to OCR's jurisdiction" because the possible uses of Chapter 2 funds are so broad.[179] Such an interpretation would have permitted OCR to retain broad authority with respect to many districts with sex discrimination problems. But the Department's Reviewing Authority soon significantly narrowed this interpretation. In 1985, the Reviewing Authority dismissed an enforcement proceeding against a school district that maintained sex-segregated physical education classes, finding that the Department had no authority to apply Title IX, because no federal funds were specifically earmarked for the physical education program, even though other federal funds received by the district could have been used for the physical education classes.[180] This interpretation effectively confined OCR jurisdiction to cases where federal money could be traced directly to programs that discriminated, severely limiting enforcement efforts.

Another serious effect of *Grove City* was to discourage girls and women from filing complaints with OCR. Reports indicate that many women were afraid to file a complaint, viewing the risk to their education or jobs as too great if, after they had filed a complaint, OCR found that their specific program received no federal funds, and then dismissed their complaint.[181]

There has also been a decline in Department and overall federal support for programs to increase sex equity on a voluntary basis since 1981. In 1974, Congress passed the Women's Educational Equity Act (WEEA), 20 U.S.C. § 3341 *et seq.*, which established a program of grants and other support for projects to promote sex equity in education. Since 1981, however, the Executive Branch has sought to eliminate the program, and funding has been cut from $10 million in 1980 to $3.3 million in 1988. Although WEEA was intended to help develop and distribute model programs to address sex equity problems, Department of Education policies have resulted in no new model programs being published between May, 1984 and May, 1987.[182] Congress has sought to improve sex equity problems in vocational education through the Carl D. Perkins Vocational Education Act of 1984, 20 U.S.C. § 230 *et seq.*, which requires 12 percent of each basic state grant in support of vocational education to be earmarked for female students and set up a sex equity coordinator to monitor programs for female students. It is clear that serious problems of sex discrimination remain, however, that must be effectively combated as the nation moves into the 1990s.

While the passage of the Civil Rights Restoration Act should prevent the Department of Education from refusing to handle cases based on lack of jurisdiction under Title IX, the past eight years have seriously damaged efforts towards sex equity in education. The recommendations for improved federal enforcement in this area echo those discussed previously pertaining to the prohibitions against race discrimination. Accordingly, it is *recommended* that OCR once again aggressively enforce complaints of sex discrimination filed with it, and develop uniform guidelines to be sent to each regional office concerning the processing of different types of complaints of sex discrimination. OCR should also establish a more comprehensive monitoring procedure to ensure that school districts which have violated Title IX in the past have actually corrected their procedures so that they are in compliance with Title IX at the time of any settlement agreement, and so that they remain in compliance thereafter.[183] As part of what should become a comprehensive monitoring system, OCR should require that districts collect and maintain information on the nature and extent of sex equity activities, and OCR should analyze which activities prove most successful. It is also recommended that OCR resume its practice of broad audits of educational institutions suspected of discriminating.[184] This should include analyses of tests which appear to severely impede academic opportunities for female students. The Department should actively promote the development and dissemination of model sex equity programs, such as programs to improve voluntary compliance with Title IX, and increased funding should be provided for the Women's Education Equity Act and other initiatives to combat sex discrimination in education.

6. Ensuring equal educational opportunity for language-minority students

In 1968, the federal government first addressed the distinctive educational needs of language-minority students by enacting the Bilingual Education Act as Title VII of the Elementary and Secondary Education Act. During the next dozen years, the federal courts, the Congress, and four presidents pushed forward together along two parallel tracks to ensure that language-minority students receive effective and equal educational opportunities. The first track, represented by the Bilingual Education Act, involved the provision of federal aid and technical assistance to help schools develop effective instructional programs for non-English-language background students. The second track involved the enforcement of civil rights prohibitions against national-origin discrimination and the enactment of an equal educational opportunity law that requires schools to act affirmatively to overcome the language barriers confronting limited-English-proficient (LEP) students.

Since 1981, however, federal efforts to improve the education of language-minority students have slackened dangerously. In addition to seeking reduced appropriations for federal bilingual education programs, there have been repeated efforts to restrict student program eligibility and to eliminate the key feature of these programs--the provision of instruction through both English and the student's native language. At the same time, the Department has failed to discharge its responsibilities to protect the civil rights of national origin minority students who are limited in their English language proficiency. As our nation moves towards the 1990s, these serious problems must be addressed effectively.

a. Estimating the number of language-minority and limited-English-proficient students

According to the 1980 census, approximately 4.5 million school-age children lived in U.S. homes where a language other than English was spoken, classifying them as language-minority children. According to estimates, this number grew to nearly eight million by 1985.[185]

In 1982, Secretary of Education, T. H. Bell, reported that as of 1978 there were approximately 3.6 million school-aged language-minority children who were limited in the English-language skills needed to succeed in an English-medium school. Three-quarters of these limited-English-proficient children were born in the United States, or one of its outlying areas, and approximately 70 percent of the LEP students in 1978 spoke Spanish. The secretary also reported that there were 24,000 Navajo children with limited English proficiency aged 5 to 14 in 1980.[186]

> The number of language-minority children in the United States is projected to increase by nearly 40 percent by the year 2000, and Spanish language background children by over 50 percent. These percentages contrast with the projected increase in the number of school-age children in the general population which is about 16 percent.
>
> The number of LEP children in the United States is projected to increase by about 35 percent by the year 2000. Ninety-two percent of the projected increase will have Spanish language backgrounds.[187]

More recent Department of Education estimates of the LEP student population have been the subject of controversy. In 1986, Secretary of Education, William J. Bennett, released a report which slashed LEP student population estimates by almost two-thirds. The new estimates reported a total 1982 LEP student population of 1.2 to 1.7 million.[188]

Members of Congress challenged the accuracy of the Department's 1986 LEP student estimates, noting that most states had reported continuing growth of the language-minority and LEP student populations since the late 1970s. The state with the largest language-minority population, California, reported that its LEP student population had more than doubled between 1977 and 1986, rising from 233,444 to 567,564 students. Experts on the LEP student population noted that the Department's new estimates were based on dramatically reduced standards of English proficiency, and that the Department had used an arbitrary system of "indicators" to exclude otherwise LEP students from the estimate.[189]

The current lack of accurate counts and estimates for U.S. language-minority and LEP student populations is, in itself, a matter of national concern. The absence of reliable population data enfeebles federal policy-making, technical assistance, program administration, and civil rights enforcement on behalf of this growing segment of the American student population.

Accordingly, it is *recommended* that the Department of Education take steps to improve federal counts, estimates, and projections of the language-minority and LEP student populations. The Department should avail itself of all pertinent federal data as well as statistics gathered by state and local agencies. In analyzing these data, the Department should utilize the services of individuals with professional expertise in the demography of American language-minority populations.

b. The educational plight of language-minority students

For language-minority students, the impediments to academic success are several and severe. A disproportionate number of language-minority and LEP students are poor.[190] Hispanics in general are twice as likely as white Americans to be poor,[191] and more than half of all Puerto Rican children living in the United States in 1984 lived in poverty.[192] The parents of language-minority students are usually limited in their own English proficiency, and have significantly less educational preparation than the general population. According to the 1980 census, while more than half of all blacks and more than 70 percent of all whites age 25 and over had completed high school, of Hispanics 25 years of age and over, only 45 percent had completed high school.[193] Poverty is only part of the problem. Many language-minority children and even more of their parents have suffered discrimination at the hand of private parties and the government. In education, as well as other areas of social life, Indian, Hispanic, Asian and other nonwhite Americans have frequently been denied the opportunities available to whites. While the nation has moved closer to the goal of a color-blind society, we have yet to eliminate racial and ethnic discrimination or to overcome its lasting effects.

But in addition to these barriers to educational success, LEP students face additional challenges. First, they must learn English, a language other than their mother tongue. At the same time, LEP students must advance in their development of academic and social skills. And finally, many LEP students must learn to appreciate and accommodate a culture different from their own. For those LEP students who are newcomers to this country, "culture-shock" is often compounded by the traumas of war, famine, and disaster--forces that drive many families from their native lands.

Despite their acute educational needs, LEP students are not well-served by our schools. In 1982, Education Secretary Bell concluded that "although local school districts and states are making an effort, schools in general are not meeting the needs of LEP students."[194] The secretary reported that "many schools are not assessing the special needs of language-minority children. They are not assessing the English language proficiency of these children, much less the home language proficiency, as a basis for planning programs and providing services." And of the students identified as LEP, only one-third were receiving either bilingual instruction or instruction in English as a second language, without the use of their home languages.[195]

The most recent national empirical study of the educational condition of language-minority students was published in 1985 by the Educational Testing Service (ETS).[196] The ETS study was carried out as part of the National Assessment of Educational Progress, the federal government's primary program for measuring the educational performance of our schools and children. Under the NAEP program, a representative sample of more than one million students in the fourth, eighth, and eleventh grades are tested annually to determine their academic achievement. Under NAEP procedures, however, school officials were allowed to exclude students they judged unable to participate in the assessment because of disabilities (physical, mental, or behavioral disorder) or because their ability to speak English was *extremely* limited.

Of the four primary racial/ethnic groups identified in the NAEP survey (white, black, Hispanic, and other), students classified as Hispanic and "other" were most likely to be excluded from the NAEP assessment, and in more than 80 percent of the cases because of limited English proficiency. Thus, while "other" students constituted only 2 percent of all surveyed fourth graders, they constituted 10 percent of the fourth graders excluded from assessment. And 6 percent of all fourth grade Hispanic students in the sample and 5 percent of Hispanic eighth and 11th graders were excluded from assessment because of severe limitations in English proficiency.[197]

Of the assessed students, language-minority students (defined narrowly as children who come from homes where "most" people speak a language other than English) constituted 9 percent of the fourth grade, 7 percent of the eighth grade, and 6 percent of the eleventh grade NAEP sample. Despite the narrowness of the definition, more than 42 percent of the Hispanic students and more than one-third of the Asian and American Indian students assessed at all three grade levels were identified as language-minority.

NAEP reading test scores showed that "language-minority students, especially Hispanic children, are [performing] considerably below the national average, and that discrepancy increases with grade level and demands for performance on higher level reading tasks. Indeed, language-minority Hispanic students in the eleventh grade are performing at a level comparable to the national sample at grade eight."[198]

Reading test scores for the children assessed under NAEP were used to group students according to five levels of reading proficiency: Rudimentary, Basic, Intermediate, Adept, and Advanced. While 96 percent of all NAEP-assessed fourth graders had achieved at least a rudimentary level of reading proficiency, only 88 percent of the Hispanic language-minority fourth graders had done so. By the eighth grade,63 percent of all NAEP-assessed students and 70 percent of the white students had achieved intermediate reading proficiency, however, only 47 percent of the language-minority and just 37 percent of the Hispanic language-minority eighth graders reached the level of intermediate proficiency. At the eleventh grade level, 90 percent of the white students had achieved intermediate proficiency, and almost half (47 percent) were rated adept. By comparison, only 65 percent of Hispanic language minority 11th graders achieved "intermediate" proficiency and only 14 percent were classified as "adept" readers.[199]

The ETS study included another index of academic progress, the promotion of students from grade to grade, by measuring student age-in-grade. The study noted that "grade repetition, as indicated by over-agedness in grade, has long been recognized as a problem for Hispanic students in general, and for Hispanic language-minority students in particular. It has been associated in previous studies with the dropout rate of Hispanic youth."[200] The ETS study found that 2 percent of all white and 3 percent of all non-language-minority fourth graders were two or more years over-age (11 or older); 8 percent of the Hispanic language-minority fourth graders, however, were more than two years over-age. The picture worsens at the eighth grade level where 12 percent of Hispanic language-minority students are two or more years over-age (15 or older) compared with 3 percent of all white eighth graders.[201]

Despite lagging reading and academic performance, more than two-thirds of all the language-minority students assessed in the 1983-84 NAEP study, both Hispanic and non-Hispanic, were receiving neither bilingual nor ESL services.[202] At the same time, the study found that Hispanic language-minority youngsters were the most segregated group of students, with two-thirds to three-quarters of these children attending predominantly minority schools.[203]

The ETS report concluded:

> The gap in reading performance of language-minority students compared with their white non-language-minority classmates suggests that the unique educational needs of pupils whose home language is not English are currently not being served sufficiently by the American educational system.[204]

As grim as they are, the ETS-NAEP findings understate the extent of our failure to provide equal and effective educational opportunities to language-minority students. The most flagrant evidence of this failure--student drop-out rates of nearly 50 percent for Hispanic and Indian language-minority students--is not even addressed by the NAEP, since NAEP only addresses the performance of students still enrolled in school.

c. Background of federal bilingual education programs prior to 1981

On January 2, 1968, President Lyndon B. Johnson signed into law the Bilingual Education Act, successfully concluding a year of intense congressional activity focused on the educational needs of language-minority students, including all children of "limited English-speaking ability."[205]

The factors contributing to the federal decision to authorize funds specifically for the education of language-minority children were described by one scholar of federal education policy as follows:

> One factor influencing the federal view was the arrival of hundreds of thousands of Cuban refugees following the Castro revolution in Cuba. These refugees brought the issue of bilingual-bicultural education to the forefront since they had no intention of giving up their native culture or language. Another factor was the growing realization by educators of the special needs of the large numbers of limited and non-English speaking children in the public schools such as the Puerto Ricans in New York and the Mexican Americans in the Southwest. Still another factor was the civil rights movement of the 1960s which raised the concept of equal- educational opportunity in a way that began to inspire first questions and later demands from Spanish-surnamed and Indian American minorities. Finally, as the federal government accepted a responsibility to help disadvantaged children bridge the awareness gap caused by poverty backgrounds, it became apparent that linguistic gaps could no longer be ignored either.[206]

Senator Yarborough's explanation of the final bill was direct:

> The concept of the bill is really very simple--so simple that it is amazing that in all of our years of striving for improved education the problem has never been given much attention. The problem is that many of our school-age children in this nation come from homes where the mother tongue is not English. As a result, these children enter schools not speaking English and not able to understand the instruction that is all conducted in English.[207]

The Bilingual Education Action (BEA) established a voluntary, competitive grant program to "provide financial assistance to local educational agencies to develop and carry out new and imaginative elementary and secondary school programs" designed to meet the special educational needs of children of "limited English-speaking ability." Schools serving high concentrations of children from families with incomes below $3,000 per year or receiving payments under a program of aid to families with dependent children were eligible to apply for grants.

Under the BEA, grant funds could be used for pre-service and in-service training and for the establishment and operation of special instructional programs for language-minority students. Activities specified in the law as eligible for support included:

> (1) bilingual education programs;
>
> (2) programs designed to impart to students a knowledge of the history and culture associated with their languages;
>
> (3) efforts to establish closer cooperation between the school and the home;
>
> (4) early childhood educational programs related to the purposes of this title and designed to improve the potential for profitable learning activities by children;
>
> (5) adult education programs related to the purposes of this title, particularly for parents of children participating in bilingual programs;
>
> (6) programs designed for dropouts or potential dropouts having need of bilingual programs;
>
> [and]
>
> (7) programs conducted by accredited trade, vocational, or technical schools.[208]

The primary restriction on BEA grants was that they were required to be used by school districts to supplement, and in no case supplant, Title I-funded services to limited-English-speaking students.

Funding for the Bilingual Education Act was authorized for three years in progressively larger amounts: $15 million for fiscal year 1968; $30 million for 1969; and $40 million for 1970. Actual appropriations, however, fell far short of authorization limits. In fiscal year 1968, no funds were appropriated. In fiscal year 1969, $7 million in appropriations supported 76 project grants serving approximately 26,000 pupils. In fiscal year 1970, appropriations of $21.3 million supported more than 130 projects serving approximately 52,000 students.

The Education Amendments of 1969 extended the authorization of the Bilingual Education Act for two years, through fiscal year 1973, at increasingly higher appropriations limits. The 1969 Amendments also authorized the commissioner to make payments to the Secretary of the Interior for BEA programs in Indian reservation schools. Appropriations for the BEA rose from $25 million in fiscal year 1971 to $35 million in 1972, and to $45 million in 1973. At the same time, Congress authorized the expenditure of funds under a variety of existing and new federal education programs for bilingual-bicultural activities.

In 1974, Congress rewrote the Bilingual Education Act and reauthorized the Act through fiscal year 1978. The revisions, part of the Education Amendments of 1974, expanded the federal government's involvement in bilingual education in a number of ways. The 1974 Amendments also clarified the meaning of the Act's key term--"limited English speaking ability"--and clarified the kinds of programs eligible for Title VII assistance. In place of the broad and nondescriptive phrase "new and imaginative elementary and secondary school programs" set out in the original Act, the Amendments used the term "program of bilingual education" and defined it as:

> . . . a program of instruction, designed for children of limited English-speaking ability in elementary and secondary schools, in which, with respect to the years of study to which such program is applicable--(i) there is instruction given in and study of English and to the extent necessary to allow a child to progress effectively through the educational system the native language of the children of limited English-speaking ability, and such instruction is given with appreciation for the cultural heritage of such children, and, with respect to elementary school instruction, such instruction shall, to the extent necessary, be in all courses or subjects of study which will allow a child to progress effectively through the educational system.

While the 1974 Amendments loosened the family poverty requirements set out in the original Act, they added a new requirement that grant applications be developed in consultation with parents, teachers, and secondary students, and that successful applicants provide for continuing participation in the program of a parent committee.

The Amendments also included provisions to prevent the segregation of students in BEA programs. Title VII grantees were to make provision for the participation of children of limited English-speaking ability in regular classes for the study of art, music, and physical education. And grantees were authorized to provide for the voluntary enrollment of a limited number of English-language-background students "in order that they may acquire an understanding of the cultural heritage of the children of limited English-speaking ability. . . ." This authorization for the voluntary enrollment of English-language-background students was limited, however, by a statutory caution: "In no event shall the program be designed for the purpose of teaching a foreign language to English-speaking children."

To carry out the expanded BEA, Congress increased the fiscal year 1974 authorization level to slightly more than $141 million and provided for annual increases reaching $170 million in fiscal year 1978. Appropriations to carry out the restructured Bilingual Education Act increased steadily and substantially, rising from $68 million in fiscal year 1974 to $146 million in 1978.

The House Report on the Education Amendments of 1978, the next legislation revising and reauthorizing the Bilingual Education Act, provided the following capsule overview of the operation of the program nine years after its enactment:

> Fiscal year 1977 appropriations for the Act totaled $115 million. Seventy five percent of these funds were spent for grants for basic demonstration programs to over 425 local educational agencies in 47 states and outlying areas. Just over 60 percent of the funds are expended on Spanish-language programs with the remainder being spent on multi-lingual programs . . . involving one of 67 other languages.
>
> The remainder of funds under the Act are used for a variety of support services, including grants to institutions of higher education to develop and improve teacher training programs, graduate fellowships to prepare trainers of teachers, grants to states for technical assistance, and funds for a Title VII network consisting of 15 resource centers, 14 materials development centers, three dissemination and assessment centers and a national clearinghouse. Under the program, 100 institutions of higher education are offering teacher training to an estimated 25,000 personnel. At the graduate level, the fellowship program offers advanced degrees in 42 institutions reaching about 500 candidates.
>
> About 57 percent of the basic local educational agency grants reach urban areas, 36 percent reach towns and suburban areas, and about 6 percent reach rural areas. The majority of the programs are concentrated in California, Texas, and New York. Nine states did not operate any Title VII programs in fiscal year 1977.[209]

Like the 1974 Amendments, the 1978 Amendments to the Bilingual Education Act refined key terms in the law. The new legislation used the term "limited English proficiency" rather than "limited English-speaking ability" and provided a more functional educational definition: individuals who "have sufficient difficulty speaking, reading, writing, or understanding the English language to deny such individuals the opportunity to learn successfully in classrooms where the language of instruction is English." Thus, for the first time, the Bilingual Education Act referred to the specific language skills involved in learning. The new definition of "limited English proficiency" also included language to highlight the eligibility of American Indian and Alaskan Native students.

In keeping with Congress's continuing concerns about school segregation, the 1978 Amendments clarified that up to 40 percent of the students enrolled in Title VII Programs could be English-language-background children. While the 1978 Amendments required that such integrated programs be principally focused on helping LEP children improve their English language skills, the Amendments eliminated the prohibitory reference to foreign language teaching set out in the 1974 Act.

The 1978 legislation anticipated significant future growth in the Title VII program. The Amendments provided a $200 million authorization level for fiscal year 1978, with a $50 million annual increase in authorization levels through 1983. Finally, the 1978 Amendments directed the secretary of HEW to submit, not later than 1981, a report to the president and the Congress "setting forth recommendations on the methods of converting, not later than July 1,1984, the bilingual education program from a discretionary grant program to a formula grant program."

The expansionary vision of bilingual education set out in the 1978 Amendments was not matched by money. While fiscal year 1978 appropriations increased by more than $30 million to $146 million, total Title VII funding in fiscal year 1980--the highest in the Act's history--was only $167 million, less than half of the authorization level.

6. Background of federal civil rights efforts on behalf of language-minority students prior to 1981

The federal government's first efforts to ensure equal educational opportunities for language-minority students grew out of the prohibition against "national origin" discrimination in federally-assisted programs and activities contained in the Title VI of the 1964 Civil Rights Act. In 1968, the Department of Health, Education, and Welfare (HEW) issued guidelines which held "school systems . . . responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system." Just over a year after President Nixon took office, the director of OCR followed up on the general 1968 guidelines with specific information on the civil rights responsibilities of schools serving language-minority students.

On May 25, 1970, the director of OCR sent a memorandum to school districts whose national-origin minority group enrollments exceeded five percent.[210] The memorandum noted "a number of common educational practices which have the effect of denying equality of educational opportunity to Spanish-surnamed pupils." "Similar practices," it continued, "which have the effect of discrimination on the basis of national origin exist in other locations with respect to disadvantaged pupils from other national origin-minority groups, for example, Chinese or Portuguese."

To "clarify HEW policy on issues concerning the responsibility of school districts to provide equal educational opportunity to national-origin minority-group children," the memorandum identified four basic school district responsibilities:

> (1) Where inability to speak and understand the English language excludes national-origin minority-group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.
>
> (2) School districts must not assign national-origin minority-group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills; nor may school districts deny national-origin minority-group children access to college preparatory courses on a basis directly related to the failure of the school system to inculcate English language skills.
>
> (3) An ability grouping or tracking system employed by the school system to deal with the special language skill needs of national-origin minority-group children must be designed to meet such language skill needs as soon as possible and must not operate as an educational dead-end or permanent track.
>
> (4) School districts have the responsibility to adequately notify national-origin minority-group parents of school activities which are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

The memorandum signaled the beginning of increased activity within OCR on behalf of language-minority students. Its full significance, however, would not be realized until the Supreme Court's 1974 decision in *Lau v. Nichols*.

Lau was a class-action suit brought on behalf of LEP students of Chinese ancestry enrolled in the San Francisco public school system. Of the 2,800 Chinese LEP students, about 1,000 received supplemental instruction in the English language; about 1,800, however, received no special instruction. The plaintiffs alleged that the school district's conduct violated both the Fourteenth Amendment of the Constitution and the Title VI of the Civil Rights Act of 1964, but they did not seek a specific remedy --only that the Board of Education be directed to apply its expertise to the problems and to rectify the situation.

Both the District Court and the Court of Appeals found no violation of the Chinese students' constitutional or statutory rights. The Court of Appeals concluded that the San Francisco school district's duty to non-English-speaking Chinese students "extends no further than to provide them with the same facilities, textbooks, teachers and curriculum as is provided to other children in the district."[211]

In 1974, the United States Supreme Court unanimously overturned the lower court's decisions in *Lau*, finding that the school district had violated Title VII.[212] Because it found that plaintiffs' statutory civil rights had been violated, the Court did not consider their constitutional claims.

In delivering the Court's decision, Justice Douglas reviewed provisions of the California Education Code regarding English language and bilingual instruction in the State, high school graduation requirements pertaining to English proficiency, and the compulsory full-time education of children between the ages of six and 16 years. Justice Douglas reasoned that:

> Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.
>
> Basic English skills are the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[213]

Justice Douglas then cited the general Title VI guidelines, promulgated by HEW in 1968, barring actions which are discriminatory in effect even though no purposeful design is present. "It seems obvious," he wrote, "that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program--all earmarks of the discrimination banned by the regulations."[214] The Court also cited the provisions regarding students' English language deficiencies set out in the 1970 OCR Memorandum, noting that school districts agreed to comply with these requirements as a condition for receiving federal aid.[215]

Even before *Lau*, OCR officials knew from previous compliance reviews that most schools were doing little or nothing to overcome the special barriers confronting language-minority students. Once the Supreme Court had ruled in *Lau*, OCR focused its attention on the question the Court did not answer--what kind of special instruction should schools provide to limited-English-proficient students. To develop answers to the question, HEW assembled a task force of experts on language-minority education and school administration.

In August 1975, the commissioner of education announced the issuance of HEW guidelines for compliance with Title VI under *Lau*. The guidelines, officially titled "Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols*" are usually referred to as the "*Lau* Remedies" or "*Lau* Guidelines."

The *Lau* Guidelines were detailed and specific. They specified approved approaches, methods, and procedures for: identifying and evaluating national origin-minority students' English language skills; determining appropriate instructional treatments; deciding when LEP children were ready for English-medium mainstream classes; and identifying professional standards for teachers of language-minority children.

Significantly, the *Lau* Guidelines went beyond the *Lau* ruling to specify that schools should provide instruction to elementary students in their strongest language until they could participate effectively in English-only classrooms. English-as-a-Second Language (ESL) was prescribed for all students for whom English was not the strongest language. Finally, any school districts that wished to rely exclusively on ESL would be obligated to demonstrate that their programs were as effective as the bilingual programs described in the guidelines.

The *Lau* Guidelines were widely circulated in memorandum form to school officials and the public; they were not, however, published in the *Federal Register*. While the unpublished *Lau* Guidelines were concerned with remedying Title VI noncompliance, they quickly evolved into the *de facto* standards that OCR staff applied to measure school districts' compliance with Title VI under *Lau*.

Between 1975 and 1980, OCR carried out nearly six hundred Title VI *Lau* reviews, concentrating on districts with substantial language-minority student enrollments. These reviews led to the negotiation of voluntary compliance plans by 359 school districts during the five-year period. Virtually all of the voluntary compliance plans adhered to the standards set out in the *Lau* Guidelines.

In 1978, when an Alaskan school district filed suit contesting OCR's use of the *Lau* Guidelines for determining Title VI compliance, the Department of Health, Education, and Welfare agreed, in a consent decree, to publish at the earliest practical date formal Title VI *Lau* compliance guidelines.[216] Responsibility for fulfillment of the consent decree fell to the newly-formed Department of Education, which on August 5, 1980 published in the *Federal Register* a Notice of Proposed Rulemaking (NPRM). In general, the proposed rules required school districts receiving Federal assistance to provide special instruction to all limited-English-proficient national-origin minority-group students and, under most conditions, to provide some native-language instruction in academic subjects to LEP students who were more proficient in their native language than in English.

Possibly in response to prior criticism about ambiguities in the *Lau* Guidelines, the NPRM included numerous objective programmatic standards. The NRPM's standards encompassed such matters as the identification of language-minority students, the assessment of their language proficiencies, the provision of appropriate instructional services, and criteria for determining when students should "graduate" from special instructional programs.

The Education Department received over four thousand public comments on the NPRM, most of which objected to one or more of the NPRM's provisions. There were calls for congressional action to block *Lau* rulemaking by the Department. After a meeting with congressional leaders, Education Secretary Shirley Hufstedler voluntarily suspended finalization of the Title VI guidelines. Following the election of Ronald Reagan in November of 1980, Secretary Hufstedler instructed OCR staff to prepare a comprehensive analysis of the public comments received on the August NPRM. The analysis was intended to help the new administration grapple with what had proven to be an exceedingly complex and controversial set of educational, social, and legal issues.

Concerns about equality of educational opportunity for language-minority students also occupied the attention of Congress. One section of the 1974 Education Amendments, the Equal Educational Opportunities Act of 1974 (EEOA), defined as a denial of equal educational opportunity

> the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[217]

The EEOA did not define "appropriate action" and its legislative history does not amplify Congress's intent. Despite this ambiguity, the EEOA has proven helpful in legal struggles to ensure equal educational opportunities for language-minority students.

Unlike Title VI, the EEOA applies to all public schools, not just those receiving federal aid. Further, because the EEO authorizes civil actions by aggrieved individuals as well as by the attorney general, the federal courts have held that the protections of the EEOA are available to students without regard to the issue of the number of unserved students.

Since the mid-1970s, the federal courts have increasingly been called upon to determine whether language-minority students were receiving equal educational opportunities under Title VI and the EEOA. In making these determinations, the courts have closely examined such matters as the identification and assessment of language-minority students, student grouping and assignment, curricular offerings and instructional programs, staffing, training, and school communications with parents. In most of the reported cases, the federal courts have found a violation of the LEP students' rights. Furthermore, all of the court-ordered plans to remedy Title VI and EEOA violations have made provision for some instructional use of the LEP student's native language.

e. Funding Federal bilingual education programs since 1981

Federal financial assistance under the Bilingual Education Act has fallen sharply during the last eight years. Fiscal year 1988 appropriations for Title VII were 12 percent below the 1980 level in nominal dollars. When adjustments are made for inflation, federal financial support for bilingual education programs fell by more than 47 percent between fiscal years 1980 and 1988.[218]

Reductions in the level of federal support for bilingual education programs would have been even deeper if Congress had approved the Reagan administration's budget requests. In keeping with the reduced authorization levels specified in the Omnibus Budget Reconciliation Act of 1981, Congress appropriated $134 million for Title VII in fiscal year 1982, $23 million less than the previous year. Despite this substantial reduction, the Reagan administration pushed for deeper cuts in Title VII funding. In fiscal year 1983, the administration proposed to reduce Title VII appropriations to $94.5 million. Congress declined to adopt the administration's proposal and level-funded Title VII at $134 million. The next year, the administration again asked Congress to slash Title VII appropriations, this time to $92 million. Congress responded by increasing fiscal year 1984 appropriations by slightly more than $1 million to $135.5 million. Since fiscal year 1984, the administration and Congress have basically followed a hold-the-line appropriations strategy.

While the number of students in need of bilingual education programs has increased sharply, the number of students actually served under Title VII has declined substantially. In fiscal year 1981, more than 269,000 students participated in Title VII programs. In 1986, fewer than 197,000 students were participating in Title VII programs.

The impact of the decline in Title VII funding will be felt for years to come. In addition to providing grants directly to school districts for instructional programs, Title VII supports a wide range of programs and activities designed to strengthen our schools' capacities for serving language-minority students. These capacity-building components of the Title VII program have been seriously weakened. For example,

> In fiscal year 1981, Title VII provided more than 4 million in fellowship aid to 529 students in engaged in graduate study pertaining to bilingual education. In fiscal year 1987, fellowship aid stood at $2.5 million supporting approximately 250 graduate students. Currently, the Department of Education does not intend to make any fellowship awards in fiscal year 1988.
>
> In FY 1981, $9.8 million was appropriated for nineteen multipurpose resource centers to help schools improve programs for language-minority students. In fiscal year 1986, sixteen centers were operating under a $6.8 million budget.
>
> In fiscal year 1986, $3.2 million was appropriated for research studies and evaluation. Not taking inflation into account, this was just about half the amount of funding available in fiscal year 1981.
>
> Title VII funding for the development of instructional materials fell from $6.5 million in fiscal year 1981 to $250,000 in 1987.

As a result of these and other Title VII reductions, the pace of educational improvement for language-minority students has slowed substantially. It is *recommended* that significant additional appropriations be sought for Bilingual Education Act programs. The Department's 1989-90 budget request should seek to restore such funding to fiscal year 1980-1981 levels adjusted for inflation. Subsequent budget requests should provide for sustained real growth in the federal bilingual education program.

f. Federal policy concerning native language instruction since 1981

On April 8, 1982, Education Secretary, T. H. Bell, sent to Congress draft legislation to amend the Bilingual Education Act. The primary change sought by the amendments was elimination of the requirement, explicit in the Act since 1974, that Title VII programs make some instructional use of a LEP student's native language.[219] In support of this radical change, Secretary Bell testified:

> The proposed language . . . reflects our belief that school districts are in the best position to evaluate the needs of their students and to design programs in response to those needs.
>
> While at present the Title VII legislation requires the use of both English and non-English languages, or proposed legislation would not; school districts would be free to propose programs which use both languages or which use English exclusively.[220]

The administration's Title VII amendments were considered in two days of subcommittee hearings in the Spring of 1982. Most of the public testimony and expert evidence presented during the hearings contradicted the administration's proposals, and no further action was taken on the legislation during the 97th Congress.

In 1984 Congress embarked on its third legislative reauthorization of the Bilingual Education Act. A bill making significant improvements in the BEA, H.R. 5231, was introduced and then considered in a subcommittee hearing in March, 1984.

H.R. 5231 clarified the goals of Title VII instructional programs by requiring that they "allow a child to achieve competence in the English language . . . [and] to meet grade-promotion and graduation standards." The bill also required that all Title VII programs provide "structured English language instruction" through an intensive ESL component.

In place of a single type of instructional program, H.R. 5231 identified six different types of programs eligible for Title VII support. Four of the programs focused on special purposes or populations.

> Programs of Academic Excellence "which have an established record of providing effective, academically excellent instruction and which are designed to serve as models of exemplary bilingual education programs and to facilitate the dissemination of effective bilingual education practices."
>
> Family English Literacy Programs "designed to help limited-English-proficient adults and out-of-school youth achieve competence in the English language." The legislation specified that preference for participation in these programs shall be accorded to "the parents and immediate family members of children enrolled in programs assisted under this title."
>
> Bilingual preschool, special education, and gifted and talented programs.
>
> Programs to develop instructional materials in languages for which such materials are commercially unavailable.

The two other programs identified in H.R. 5231 --Transitional Bilingual Education (TBE) and Developmental Bilingual Education (DBE)--were general-purpose instructional programs. The legislation stipulated that 75 percent of all appropriations for instructional grants be reserved for TBE programs, those most resembling the "basic" programs authorized under existing law.

H.R. 5231's most significant innovation was the new authorization of grants for Developmental Bilingual Education programs. The authorization was based on the finding

> that both limited-English-proficient children and children whose primary language is English can benefit from bilingual education programs, and that such programs help develop our national linguistic resources.

Unlike the other programs set out in H.R. 5231, DBE programs were meant to promote bilingual proficiency rather than merely English proficiency. To foster this educational objective and to promote racial and ethnic integration, the legislation stipulated that

> [w]here possible, classes in programs of developmental bilingual education shall be comprised of approximately equal numbers of students whose native language is English and limited English proficient students whose native language is the second language of instruction and study in the programs.

In its original form, H.R. 5231 did not authorize Title VII support for monolingual English-language instructional programs. Accordingly, the administration voiced opposition to the bill.

As a compromise, a seventh type of instructional program, Special Alternative Instructional Programs (SAIP), was authorized. Like TBE programs, Special Alternative Instructional Programs must be designed to help LEP students achieve proficiency in English and to meet grade-promotion and graduation standards. Unlike TBE programs, these programs need not make any instructional use of the LEP child's native language

Authorization for the Special Alternative Instructional Programs was premised on a new legislative finding "that in some school districts establishment of bilingual education programs may be administratively impractical due to the presence of small numbers of students of a particular native language or because personnel who are qualified to provide bilingual instructional services are unavailable."

To prevent the administration from using the new monolingual program to divert resources from time-tested dual-language instructional programs, a formula was devised to control SAIP funding. Under the formula, four percent of the first $140 million of Title VII appropriations were reserved for SAIP. To encourage the administration to seek additional appropriations for the BEA, the formula also reserved 50 percent of all Title VII appropriations in excess of $140 million for SAIP grants, subject to a 10 percent limitation of total Title VII funding. On October 19, 1984, President Reagan signed the Education Amendments of 1984 as Public Law 98-511.

Before the Education Department had developed regulations to implement the 1984 amendments to the BEA, Education Secretary Bell resigned and President Reagan appointed William J. Bennett to be his successor. On September 26, 1985, in a speech to the Association for a Better New York, Secretary Bennett lashed out against federal bilingual education policy. Citing the high dropout rates of Hispanic students, Bennett termed the seventeen-year-old BEA a "failure." The Secretary declared:

> This, then, is where we stand: After seventeen years of federal involvement, and after $1.7 billion of federal funding, we have no evidence that the children whom we sought to help--that the children who deserve our help--have benefited.

He charged that federal bilingual education policy had "lost sight of the goal of learning English as the key to equal educational opportunity" and had promoted native-language instruction as "an emblem of cultural pride."

To "reform" federal bilingual education programs and policies, Bennett announced a three-part "initiative." First, the secretary promised that the Department would develop regulations to implement the 1984 amendments to the BEA which would give preference to programs that moved children as quickly as possible from native language instruction to mainstream classes. Second, the secretary announced that the Department would notify all school districts which had adopted voluntary compliance plans based on the "*Lau* Guidelines" that they were free to renegotiate the plans with the Department's Office for Civil Rights. Finally, the secretary announced that the Department would push for the enactment of legislation removing all restrictions on Title VII funding for English-only instructional programs.

The following spring, the Senate Subcommittee on Education, Arts, and Humanities held a one-day hearing on S. 2256, which would have eliminated the 1984 formula applicable to TBE and SAIP funding. Most of the witnesses who testified on S. 2256 opposed the legislation, and the bill did not receive further consideration in the 99th Congress.

The Education Department did not seek substantial increases in the Title VII appropriations above the $140 million level to set in motion the 50 percent escalator provision contained in the compromise SAIP funding formula. Still, in fiscal year 1987, the Department was able to make 41 SAIP grants serving almost ten thousand LEP students under the 4 percent minimum set-aside provided in the 1984 Amendments.

Meanwhile, Secretary Bennett, and other top Department officials, continued to campaign for the removal of all Title VII funding limits on SAIP grants. They asserted that English-only instructional programs were as likely to meet the educational needs of LEP students as were programs which made some instructional use of the LEP child's native language.

Anticipating legislative action to reauthorize the BEA in 1987, House Education and Labor Committee Chairman Augustus F. Hawkins asked the General Accounting Office (GAO) to review the administration's assertions regarding native language instruction in the light of contemporary research evidence. The GAO selected ten experts, five of whom had been nominated by department officials, or whose work had been cited by department officials in support of the administration's proposed bilingual education policies, to carry out this review. In March of 1987, the GAO released its report entitled "Bilingual Education: A New Look at the Research Evidence."

The GAO report contradicted the Department's position on native-language instruction. Only two of the ten experts agreed with the administration's assertion that native-language instruction did not help LEP students become proficient in English. On the question of whether research evidence supported the use of native-language instruction to teach academic subjects other than English to LEP students, only three of the experts responded in the negative. Finally, seven of the ten GAO experts disagreed with the Education Department's assertions that monolingual-English instructional programs were as likely to meet the educational needs of LEP students as programs which offer some native-language instruction.

Despite the GAO's findings, the Department continued to push the administration's amendments as Congress worked on Title VII reauthorization legislation during 1987 and 1988. As in 1984, Congress struggled to achieve a bipartisan compromise to end the controversy.

The August F. Hawkins-Robert T. Stafford Elementary and Secondary Education Improvement Act of 1988, signed as Public Law 100-297 on April 28, 1988, reauthorized the BEA through fiscal year 1993. The Hawkins-Stafford Act set a $200 million authorization limit on Title VII for fiscal year 1989 while providing an unlimited authorization of appropriations for fiscal year 1990-1993.

The Hawkins-Stafford Act authorizes the secretary to reserve up to 25 percent of all program grant funds for SAIP. At the same time, the Act requires the secretary to reserve at least 75 percent of all grant funds for TBE programs.[221] With respect to grants for the other four types of Title VII instructional programs--Developmental Bilingual Education, Programs of Academic Excellence, Family English Literacy, and Programs for Special Populations--the Act provides they may be funded from either the 25 percent permissive set-aside for SAIP or the mandatory 75 percent reservation for TBE. Finally, the Act states that the new funding reservations shall not result in "changing the terms, conditions, and negotiated levels of any grant awarded in fiscal year 1987" for the life of the grant.

Senate Labor and Human Resources Committee Chairman, Edward M. Kennedy, the chief architect of the final compromise Title VII funding provisions, explained their intent:

> Inclusion of the Senate bill's new funding reservations in H.R. 5 accommodates the Education Department's quest for greater funding flexibility without mandating increased spending for monolingual instructional programs. This enhanced funding flexibility should be exercised in a responsible fashion, and I urge both the Department of Education and my colleagues on the Senate and House Appropriations Committees to allocate nonreserved funds to those part A programs, which, on the basis of objective program evaluation and research data, are shown to be most effective in helping limited-English-proficient students achieve academic success. In this regard, I am troubled by the fact that the Department of Education currently provides only two grants, amounting to less than one-quarter of 1 percent of all part A grant funds, for two-way developmental bilingual education programs. Locally funded two-way bilingual education programs have proven effective in meeting the second-language learning needs of both limited-English-proficient students and monolingual-English students in a positive, integrated educational environment. These include several two-way bilingual programs in my own state. . . . Programs like these deserve additional Federal support, support made possible under the bill's new funding reservations.[222]

The flexible Title VII funding provisions set out in the Hawkins-Stafford Act provide a mechanism for ending, once and for all, destructive debate over the allocation of scarce resources among necessary programs. This mechanism should be used, thoughtfully and creatively, in developing its budget proposals for Title VII. Specifically, it is *recommended* that the Department propose in its next budget request to provide *equal* funding for Developmental Bilingual Education and Special Alternative Instructional Program grants the two instructional program alternatives to Transitional Bilingual Education. Transitional Bilingual

Education programs have also proven successful in meeting the distinctive educational needs of LEP students. As provided under the Hawkins-Stafford Act, it is *recommended* that such programs receive continued strong federal support.

There are local situations which render bilingual education programs for LEP students impractical. In such situations, LEP students need and deserve the kind of instruction supported by Special Alternative Instructional Program grants. Developmental Bilingual Education Programs, however, are more than simply an alternative to Transitional Bilingual Education programs. In communities scattered across the nation, locally-funded two-way developmental bilingual education programs are helping students succeed academically while becoming proficient in two languages.[223] These programs promote ethnic integration, cross-cultural understanding, and respect for other human beings in ways that few other programs can. Their success, both academic and social, follows from their basic premise that a child's language represents a resource to be developed and shared, never a "problem" to be overcome. It is *recommended* that support for Developmental Bilingual Education programs should be treated as a top civil rights and education priority.

g. Federal civil rights efforts on behalf of language-minority students since 1981

As one of his first official acts, Education Secretary, T. H. Bell, announced on February 2, 1981 that the Department of Education was formally withdrawing the Carter administration's Notice of Proposed Rulemaking (NRPM) respecting the Title VI responsibilities of federally-assisted schools serving language-minority students. Characterizing the August 5, 1980 NPRM as "harsh, inflexible, burdensome, unworkable, and incredibly costly," Secretary Bell promised that the Department would "protect the rights of children who do not speak English well," but would do so by "permitting school districts to use any way [educational program] that has proven to be successful." The secretary provided no details about the Department's new approach to Title VI enforcement.

Soon thereafter, educational leaders expressed concern to Secretary Bell that his announcement could be misinterpreted by school officials as signaling the Department's loss of interest in civil rights enforcement. The secretary responded by sending a two paragraph memorandum to chief state school officers on March 30, 1981. "The fact that the *Lau* Regulations were withdrawn as the first in a series of actions that we hope to take in our program of deregulation should not be construed as an intent on our part to not carry out the responsibilities that we have to assist and encourage full compliance with the civil rights of children with limited-English-proficiency," Bell wrote. Noting that he was scheduled to meet with the chief state school officers in June, Secretary Bell's memorandum concluded:

> In the meantime, we would urge you to encourage local education agencies to be cognizant of the law and their responsibilities. As you know, many of the rigid requirements and rules emerge from a failure to take appropriate action to comply with requirements of law. As we work together, perhaps we can persuade our colleagues from this eventuality with respect to their obligations under *Lau v. Nichols*.

Secretary Bell appointed his Under Secretary, Bill Clohan, to lead the Department's efforts to develop a flexible, yet effective, Title VI policy to protect the rights of limited-English-proficient language-minority students. Clohan, in turn, asked OCR to prepare a discussion memorandum covering the basic issues associated with the Department's Title VI *Lau* enforcement policy.

In July 1981, Assistant Secretary for Civil Rights, Clarence Thomas, sent Clohan a comprehensive memorandum on Title VI *Lau* enforcement. The memorandum reviewed the history of federal policy regarding language-based discrimination, analyzed the problem of language discrimination and its regulatory implications, reviewed alternative *Lau* enforcement policies, and outlined OCR's proposed enforcement policies and investigative procedures.

The OCR memorandum to Clohan emphasized the distinctive nature of language discrimination.

> Despite these general similarities [to other forms of illegal discrimination, for example, race and sex], discrimination against language-minority students differs from other forms of illegal discrimination in a significant respect. An

> individual's race, sex, or religion are *educationally irrelevant* characteristics. An individual's language is an *educationally relevant* characteristic, however, because language is the vehicle through which the school communicates to students. Thus race, sex, and religious discrimination occur when school officials treat individuals *differently* because of an educationally-irrelevant characteristic. Language discrimination, on the other hand, occurs when school officials ignore an educationally-relevant individual characteristic --language, and treat non-English-speaking students in the *same manner* as they treat English-speaking students. This distinction was the crux of the Court's decision in *Lau*.
>
> Moreover, the remedy for language discrimination is fundamentally different than the remedy for race or sex discrimination. To cure these latter forms of discrimination, school officials must reform their policies and procedures to eliminate consideration of educationally-irrelevant student characteristics. In most cases, school officials do not need to establish new educational programs for minorities and women, but rather must insure that minorities and women have access to and participate in the educational programs they generally offer. To cure a *Lau* violation, school officials must adjust their policies and procedures to take into account an educationally-relevant student characteristic--the language skill needs of non-English-speaking students. In most cases, school officials need to establish a special educational program for language-minority students to remedy a *Lau* violation.

In OCR's view, the distinctive nature of language-based discrimination had two major consequences for federal civil rights enforcement policy. "First, the detection and elimination of language-based discrimination requires the federal government to examine a school district's substantive educational program to a degree that is usually not required in other civil rights areas." Second, there is a "seemingly unlimited number of relevant variables [pertaining to both students and school districts] which must be taken into account in determining whether a school district is providing equal educational opportunities to language-minority students." As a result of these consequences, OCR concluded that "an effective and reasonable *Lau* compliance policy cannot be reduced to a mechanistic compliance formula." Accordingly, Assistant Secretary Thomas argued that the Department should not attempt to develop detailed Title VI *Lau* compliance standards as the Carter administration had tried in the ill-fated NPRM. "The complexities associated with the provision of equal educational opportunities to limited-English-proficient national-origin minority- students," he wrote, "seem to preclude--both practically and politically--formulation of detailed substantive Title VII *Lau* compliance standards."

The OCR memorandum proposed that the Department adopt a "flexible 'facts and circumstances' approach for determining whether a school district has taken the appropriate steps to insure that language-minority students receive equal educational opportunities. "The memorandum stated:

> The compliance standard or test would be whether the steps taken by a school district are calculated to be effective and are reasonable in light of student needs and district resources. Unlike the withdrawn NPRM and the "*Lau* Remedies," this enforcement approach would not be premised on the assumption that any one instructional methodology or service is legally or educationally preferable. Because of this fact, the general *Lau* enforcement approach proposed herein would not unnecessarily interfere with the authority of local school districts to control their educational programs.

The disadvantage of OCR's proposed *Lau* enforcement approach, Thomas conceded,

> . . . is that it requires the exercise of considerable judgment and discretion. This disadvantage is an inevitable concomitant of the flexibility and nonprescriptiveness inherent in such an approach.

Nevertheless, with appropriate "OCR staff training, headquarters monitoring of *Lau* investigations and compliance reviews, and secretarial review of all proposed findings of noncompliance," Assistant Secretary Thomas argued, OCR's proposed *Lau* enforcement approach "could be implemented so as to fulfill the secretary's commitment to *reasonable* and *effective* civil rights enforcement."

Following receipt of the July 1981 OCR memorandum, the Department's General Counsel, Daniel Oliver, raised questions about the continuing validity of an "effects test" to identify discrimination under Title VI such as that approved in *Lau*. Oliver argued that the Department should not adopt a *Lau* enforcement policy barring unintentional discrimination. In support of his position, General Counsel Oliver cited post-*Lau* court decisions holding that discrimination must be intentional before it violates Title VI and dicta from Supreme Court decisions questioning the "continuing vitality of *Lau*."

Assistant Secretary Thomas countered the General Counsel's argument against following *Lau* by sending the Under Secretary a 26-page legal analysis OCR staff had prepared on the issue. In the cover memorandum, Thomas concluded that:

> the Department has the legal authority under Title VI to require federally assisted school districts to 'provide special instructional services to limited-English proficient national origin minority students . . . and that the General Counsel's contrary views are not well developed or legally supported.

Under Secretary Clohan agreed with OCR. "I do not believe we should in effect overrule the *Lau* case prior to the Supreme Court overruling it." Accordingly, the under secretary directed both offices to develop Title VI guidelines applicable to language-minority students. Although the White House soon requested and received Mr. Clohan's resignation, his decision to uphold *Lau* was not overturned by the secretary or his successor.

While Education Secretary Bell sought not to attract public and congressional attention to OCR policy-making and enforcement activities respecting language-minority students, his successor followed a different course. As discussed earlier, Secretary Bennett's high-profile 1985 New York speech on bilingual education attacked all aspects of federal bilingual education policy, including OCR activity. One of the three bilingual education "initiatives" Secretary Bennett announced in that speech was his invitation to local school districts to modify previously negotiated *Lau* compliance plans.

OCR implemented Secretary Bennett's "initiative" later in the year by sending individual letters to the nearly five hundred school districts which had previously agreed to implement OCR-approved plans to remedy Title VI violations respecting language-minority students. The letters stated:

> This letter is to remind you that OCR policy for the past several years has been to allow school officials the flexibility to choose any educational program that meets the educational needs of the language-minority students enrolled in their schools. In that regard, [addressee school district] has the option to modify any program previously negotiated as part of the compliance agreement noted above, or to change from one type of program to another, as long as the district continues to meet the requirements of Title VI and to provide for the effective participation of all language-minority students in the educational programs it offers.

OCR attached to the letter a copy of the May 25, 1970 OCR memorandum cited in *Lau* and a new, seven-page memorandum outlining "OCR's Title VI Language Minority Compliance Procedures." OCR asked to be informed of any intended changes in the district's *Lau* plan, and promised to notify the district within ninety days as to whether the modifications complied with Title VI requirements.

OCR's invitation drew little response; after five months, only fourteen schools had proposed modifications in the previously-approved *Lau* compliance plans.[224] The invitation did, however, attract the attention of the three Chairmen of House Subcommittees which share oversight responsibility for the Education Department's Office for Civil Rights. In a joint letter to Secretary Bennett, the three representatives requested comprehensive data on OCR's past Title VI enforcement activities on behalf of language-minority students.

The data which OCR submitted to Congress provided evidence of a dramatic slackening of effort to protect language-minority students after January 1981. An *Education Week* analysis of the data revealed that school districts were nine times less likely to be scheduled for a Title VI *Lau* review during the first five years of the Reagan administration than they were in the preceding five years.[225] Between 1976 and 1980,OCR carried out Title VI *Lau* compliance reviews in 573 school districts. In the first five years of the Reagan administration, however, only ninety-five Title VI *Lau* compliance reviews were conducted in sixty-six school districts. Monitoring visits to check on a school district's implementation of voluntary *Lau* plans also fell off sharply during this period.

The OCR data also reflected continuing discrimination against language-minority students. Despite the Department's utilization of flexible and permissive Title VI compliance standards, OCR found legal violations in 58 percent of the *Lau*-related investigations carried out since 1981.[226]

Accordingly, it is *recommended* that OCR and the Department recommit the federal government to protecting the civil rights of limited-English-proficient national-origin minority-group students. There should be a major increase in the number of OCR school district monitoring visits and compliance reviews. These monitoring visits and compliance reviews should be targeted on, but not limited to, districts which OCR survey data and other public information indicate are likely to be in noncompliance with the requirements of Title VI. At the same time, OCR must expand outreach efforts to inform both school officials and the parents of language-minority students of their responsibilities and rights under law.

In addition, while the Department has withdrawn proposed compliance standards and previous *Lau* guidelines, it has not officially promulgated new guidelines and standards. School personnel and parents both need, and deserve, federal guidance in this critical and complex civil rights area. It is thus *recommended* that OCR and the Department act quickly to provide legally and educationally sound guidance concerning the Title VI responsibilities of schools serving limited-English-proficient students. This guidance can be provided through new regulations of general applicability, through a public reporting service of OCR individual case-determinations, or a combination of both.

With respect to ensuring equal educational opportunity for limited-English-proficient students, as in the other areas discussed in this analysis, the Department and OCR have failed to fulfill their responsibilities over the last eight years. Implementation of the recommendations suggested in this analysis is critical to provide for effective protection of civil rights and equal educational opportunity for America's school children.

IV. Summary of Recommendations

A. The Civil Rights Division

1. Initiation of new cases

The Division should significantly increase its efforts to investigate and file new cases to combat the continuing problems of school segregation and inequality of educational opportunity, focusing its efforts on cases attempting to achieve metropolitan-wide desegregation and to pursue the link between segregated housing and segregated schools.

2. Seeking remedies for illegal segregation and denial of educational opportunities

a. Opposition to use of mandatory student reassignment plans

The Division should end its rigid opposition to the use of mandatory transportation as a remedy in school desegregation cases, and should return to its previous policy of considering the use of all available remedies and of supporting relief which would be most effective in individual cases.

b. Reliance on purely voluntary measures and opposition to enforceable relief

The Division should employ magnet schools and other voluntary desegregation methods, both in settling and litigating cases, only where they are part of an overall desegregation effort including effective enforcement or backup measures and will not impair educational opportunities of children in nonmagnet schools. Division policy should seek to effectuate the principle established by the Supreme Court that affirmative steps must be taken to eliminate school segregation and its effects to the maximum extent possible.

c. Refusal to seek and opposition to necessary funding for effective desegregation and equality of educational opportunity

The Division and the entire federal government should support the provision of funding necessary for magnet schools and other voluntary desegregation programs and for compensatory and remedial education programs. In particular, the Division should seek and support remedies pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977), to require State governments to help fund magnet, compensatory, and remedial programs to assist in remedying the vestiges of segregation.

d. Refusal to seek systemwide remedies

The Division should seek systemwide relief in desegregation cases in accordance with *Keyes v. School District No. 1*, 413 U.S. 189 (1973), and should fully utilize the principles of *Keyes* in initiating and conducting school desegregation litigation.

e. Reversal of opposition to tax exemptions for discriminatory private schools

The Division should support methods at the State, local, and federal level to combat discrimination by private schools and to prevent the use of private schools to avoid desegregation, including requesting court orders in desegregation cases litigated by the Division.

3. Termination of litigation: the issue of unitary status

The Division should adhere to the principle that a school district can be declared unitary only if it has actually eliminated all vestiges of segregation to the maximum extent practicable, including harmful educational and residential segregative effects of school segregation. In addition, the Division should return to its previous practice of not initiating attempts to have a school district declared unitary and thus dismiss desegration claims against it. The Division should consult specifically with OCR and all parties to a case before deciding what position to take with respect to a request to declare a district unitary, or dismiss a case, and should not support such a request where there are recent or unresolved complaints of discrimination or vestiges of segregation which can be elimiated by further action. Where cases are to be dismissed, the Division should explore the possibility of keeping in place injunctions which prohibit future discrimination, or call for the continuation of desegregation plans when necessary. The Division should also support the principle that where an injunction calling for desegregation has been entered, the defendant must bear the burden of proving changed circumstances sufficient to justify modifying or eliminating the injuction.

B. The Department of Education and the Office of Civil Rights

1. Processing of complaints

OCR should seek to expend properly all funds appropriated for its enforcement activities and request additional funding as necessary. OCR should institute additional monitoring and develop guidelines to avoid improperly suspending or delaying the processing of OCR complaints and help promote compliance with the *Adams* timeframes. This may include modifying or providing additional flexibility in meeting such timeframes in some types of cases, such as complex, multi-issue, multiparty cases. Any changes in the *Adams* timeframes should be accomplished through notice-and-comment rulemaking by the Department. Efforts should also be made to improve the efficiency of case processing where possible without compromising quality. OCR should promulgate and distribute policy directives on civil rights enforcement issues on a timely basis, consistent with applicable law, to OCR regional offices and the general public. In addition, OCR should analyze and develop proposals for possible joint OCR-state handling of individual complaints now processed by OCR.

2. *Initiating and conducting compliance reviews*

OCR should return to the methodology used prior to 1984 in its vocational and civil rights surveys, and determine whether a comprehensive national resurvey is needed for 1990. In conjunction with improving the complaint investigation process, OCR should also seek to develop methods to increase the number and role of compliance reviews as part of the OCR enforcement process. Selection of compliance review sites should be based on qualitative criteria such as OCR survey data rather than random selection. OCR should also remove restrictions on conducting compliance reviews of districts which are subject to court or OCR-approved desegregation plans or have requested technical assistance from OCR, and should study other ways to help prevent potential conflicts between OCR's enforcement and technical assistance functions. OCR should also develop policies to use its authority under the federal magnet school assistance program to gather and evaluate data effectively to determine compliance with civil rights laws, including establishment of a policy to utilize an "effects test" in clearing districts to receive magnet funds. Compliance reviews should generally be systemwide rather than focusing on particular isolated programs.

3. *Obtaining relief for civil rights violations*

OCR should develop and implement guidelines for its enforcement and settlement practices. These guidelines should focus on determining which types of enforcement should be used in particular cases, avoiding delays when cases are referred to the Division, ensuring that settlements in cases where violations are found actually correct violations, prohibiting reliance on assurances of good faith or future actions in settlements without effective monitoring to ensure actual performance, and ensuring that resolution of cases prior to the issuance of findings is in accord with applicable laws and regulations. OCR should abolish the use of "violation corrected" Letters of Findings and return to its prior practice of issuing Letters of Findings with findings of fact and conclusions of law before negotiating corrective action. OCR should also return the quality assurance program to the national level to perform its previous functions of assessing the quality of OCR work and assuring consistent implementation of policy.

4. *Remedying in-school segregation*

OCR should focus its attention on the issue of in-school segregation, particularly in formerly segregated school districts. OCR should consider sponsoring general research into particular types of tests used by multiple school districts to assign students to classes as to which concerns have been raised of discrimination of minorities, which can be used to help identify and take action with respect to districts with problems of in-school segregation.

5. *Enforcing prohibitions against sex discrimination*

OCR should once again aggressively enforce complaints of sex discrimination, and should develop uniform guidelines to be sent to each regional office concerning the processing of different types of complaints of sex discrimination. OCR should also establish a more comprehensive monitoring procedure to ensure that school districts which have violated Title IX in the past have actually corrected their procedures so that they are in compliance with Title IX at the time of any settlement agreement, and so that they remain in compliance thereafter. As part of what should become a comprehensive monitoring system, OCR should require that districts collect and maintain information on the nature and extent of sex equity activities, and OCR should analyze which activities prove most successful. OCR should also resume its practice of broad audits of educational institutions suspected of discrimination. This should include analyses of tests which appear to severely impede academic opportunities for female students. The Department should actively promote the development and dissemination of model sex equity programs, such as programs to improve voluntary compliance with Title IX, and increased funding should be provided for the Women's Educational Equity Act and other initiatives to combat sex discrimination in education.

6. Ensuring equal educational opportunity for limited English proficient students

The Department of Education should take steps to improve federal counts, estimates, and projections of the language-minority and LEP student populations. The Department should avail itself of all pertinent federal data as well as statistics gathered by state and local agencies. In analyzing these data, the Department should utilize the services of individuals with professional expertise in the demography of American language-minority populations.

The Department of Education should seek significant additional appropriations for Bilingual Education Act programs. Its 1989-90 budget request should seek to restore such funding to fiscal year 1980-81 levels adjusted for inflation. Subsequent budget requests should provide for sustained real growth in the federal bilingual education program.

The Department should propose in its next budget request to provide equal funding for Developmental Bilingual Education and Special Alternative Instructional Program grants, the two instructional program alternatives to Transitional Bilingual Education, which should also receive continued strong federal support. Expanded support for Developmental Bilingual Education programs should be treated as a top civil rights and education priority.

OCR and the Department should recommit the federal government to protecting the civil rights of limited-English-proficient national-origin minority students. There should be a major increase in the number of OCR school district monitoring visits, and they should be targeted on, but not limited to, districts which OCR survey data and other public information indicate are likely to be in noncompliance with the requirements of Title VI. At the same time, OCR must expand outreach efforts to inform both school officials and the parents of language-minority students of their responsibilities and rights under law. OCR and the Department should act quickly to provide legally and educationally sound guidance concerning the Title VI responsibilities of schools serving limited-English-proficient students. This guidance can be provided through new regulations of general applicability, through a public reporting service of OCR individual case determinations, or a combination of both.

Mr. LYONS. Chairman, on Wednesday—Chairman Hawkins, Mr. Payne and Mr. Hayes, thank you very much for holding this hearing during a holiday recess. It is important because there is no time to recess in the struggle for equal educational opportunities. The truism that justice delayed is justice denied applies with special force to children and their rights to learn.

Nineteen years ago the Office for Civil Rights decided to pursue equal educational opportunities for language minority national origin students. These are students who come to school speaking a language other than English. They are of many races—caucasian, black, Indian. They all share one thing in common, that they don't know English and they have another language.

At that time the Office for Civil Rights issued a memorandum, and I think it is important—Elliot mentioned the bipartisan tradition that we once had in this country for civil rights enforcement and it was a Republican administration that issued a memorandum on May 25, 1970, that outlined the responsibilities of school districts serving language minority children. Those responsibilities, it would seem on the face of that memorandum, were so clear that they would be undeniable.

Number one, where inability to speak and understand the English language excludes national origin minority children from effective participation in the educational programs offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

Two, even more obvious, school districts must not assign national origin minority group students to classes for the mentally retarded on the basis of criteria which essentially measure or evaluate English language skills, nor may they deny them access to college preparatory courses on the basis directly related to the school's failure to inculcate English language skills.

Three, any ability grouping or tracking system employed by the school district to deal with special needs of national origin language minority students must be designed to actually meet such needs as soon as possible and must not operate as a dead end or permanent tract.

Number four, school districts have the responsibility to adequately notify national origin minority group parents of school activities which are called to the attention of other parents.

Nineteen years ago that was promulgated as policy. Five years later the United States Supreme Court in the only case ever rendered by that body regarding the rights of language minority, national origin minority students upheld this policy of the Office for Civil Rights. It was a unanimous decision of the Supreme Court.

Mr. Justice Douglas writing for the court again followed what would appear to be very simple straightforward logic. He stated, under these state-approved standards, referring to standards of the State of California, there is no equality of treatment merely by providing facilities, text books, teachers and curriculum for students who do not understand English are effectively foreclosed from any meaningful education.

He went on to say that basic English skills are at the very core of what these public schools teach. Imposition of a requirement that before a child can effectively participate in the educational program he must have already acquired these basic skills is to make a mockery of public education.

We know that those who do not understand English are certain to find their classroom experience wholly incomprehensible and in no way meaningful.

We have departed in the last decade from a commitment to meeting the needs of language minority students and ironically, our departure from the commitment has occurred when the need for the commitment is greater than ever.

Half of the children last year that entered the New York City public schools and the LA unified school district, to mention the largest two school districts in the country, came to school speaking a language other than English and they were limited in their English language proficiency. These students had all the needs of every other group of students in the country.

In addition to being language minority children, some are gifted and talented. Others are handicapped and have special needs. A majority of these students are poor. Their parents themselves in most cases lack extensive formal education or effective formal education in many cases because as language minority Americans they too were the victims of prior discrimination.

In working with the Citizens' Commission on civil rights and in reviewing the excellent staff report prepared by this committee, it is very clear that of all the nonpriorities of the Office for Civil Rights, the lowest nonpriority is protecting the rights of language minority students, even though as I said, this is the fastest growing student population in the country.

It is ironic because Secretary of Education Bell when he took office withdrew some appropriated regulations under Title VI to implement the law decision. He made a vow and it was one of his most public actions in the area of civil rights certainly under Title VI. He made the promise to protect the rights of students who don't speak English well, but he promised flexibility in the way that was to be achieved by allowing school districts to pursue any method that is proven successful.

If that had even been done, I would not be here today telling you this sad story. In point of fact, it never was done. Your own staff report says that the smallest number of complaint investigations, the smallest number of compliance reviews, less than three percent, have focused on national origin discrimination against language minority students.

Rather than belabor the problems, let me make a few recommendations of how we might move ahead together in securing greater opportunities for this fast growing segment of our student population.

Number one, and this doesn't just go to OCR, I recognize this is the full Education and Labor Committee and I think it is relevant to you, although it would be more direct to the Appropriations Committee, we have to do something to rechannel Federal aid or to expand Federal aid in terms of those in the greatest needs. Specifically, we have seen a decline in the Federal assistance available to help school districts do a good job in educating language minority students, a decline by almost 50 percent.

What we have also seen is a growing imbalance, because during the same 10 year period aid to bilingual education and English as a second language education has effectively been cut by over half, meanwhile increases have been made in other Federal education programs.

For example, education of the Handicapped Act—and I am not suggesting that we are spending one penny too much under the education of the Handicapped Act—but let me bring to you a problem that is constantly brought to my attention when I visit school districts, and I find Haitian, Hispanic, and Asian students in special education classes. These classes are for the mentally retarded or learning disabled and in talking to school administrators they admit these students who have normal intellectual capacity. They are not mentally retarded. They simply speak a language that the school is unprepared to teach in and to work with their parents in that language.

It is a horrendous problem. It is sort of like a perverted twist on a concern that this committee had many years ago that Federal dollars follow a child when the child is part of a desegregation program under Title I at that time, now Chapter I.

What we are seeing is children chasing money because there is money available under the education of the Handicapped Act and there is not money available under the Bilingual Education Act. These children are being stigmatized by being classified as mentally retarded and they are not being provided the services that they need or deserve. That is a violation of Title VI and a violation of Section 504.

Number two, especially for this population we cannot rely upon a complaint system exclusively or even heavily. Compliance reviews are so tremendously important for a lot of reasons. Language minority parents—and they are limited in their English proficiency in 99 percent of the cases or their children wouldn't be—face, first of all, a language barrier in filing complaints and in recognizing their rights.

Second, some of these parents are not documented citizens but their children have according to the Supreme Court of the United States a right to education, they also have a right to an equal educational opportunity.

I think it would be folly to suggest that parents who themselves are in jeopardy of being put out of this country should be the ones to come forward to complain when the civil rights of their children are being violated.

Number three, it seems to me that we need to have not only adherence to time frames but these time frames have to be realistic and these are very difficult cases. Therefore, there ought to be some realistic time frames, especially in language minority compliance reviews.

I think it would be helpful if OCR would begin to report its decisions in cases. We have waited eight years to find out that nothing has been happening. If case decisions were reported regularly we could not only determine the level and the volume of activity, we could also determine the appropriateness and correctness of that activity.

Thank you.

Chairman **Owens**. Thank you.

I want to thank all the panelists. I will yield to Mr. Payne for the first questions—he just left. He has a 3:00 o'clock appointment so I wanted to give him an opportunity to ask the first questions but since he stepped out, I will begin by asking what do you think some other alternative ways of having the intent of Congress carried out might be? None of you mentioned the legal services offices out there. They have been harassed by the previous Administration and are not being treated much better by this Administration but they are out there and funded to handle some of these cases.

Are they of any great help? Should we appropriate funding advocate groups of another kind in order to get the law enforced, have the OCR put on the spot, OCR watch groups? Are there any alternatives you would like to appropriate for accomplishing the greater enforcement of the civil rights laws?

Mr. **Chavkin**. I think the answer to that question at least from the perspective of persons with disabilities may be a little different from a Title VI and Title IX perspectives. Let me explain why.

First with regard to the increased availability of legal resources, one of the networks that exists besides the legal services programs is the network of protection and advocacy programs. That is a very critical resource for lots of families. It obviously needs more money as does the legal services corporation. Surveys indicate that most protection and advocacy programs which are designed to protect the rights of persons with developmental disabilities only can serve about one in 10 of the people who need legal services. The reason why I think it is a little different for persons with disabilities is that one of the major gaps that exists is the legal standard that should be applied and it leaves the courts to which legal recourse would be sought very much adrift.

There is much better guidance with regard to Title VI enforcement for example than there is with regard to Section 504 and one specific example may highlight that.

Chairman **Owens**. We heard just the opposite this morning.

Mr. **Chavkin**. I know that that view has been expressed. Let me give you a specific example. The whole Education for the Handicapped Act is structured around the idea of a free appropriate public education.

What does the word appropriate mean? When the Supreme Court got to consider that with absolutely no guidance from the Office for Civil Rights or the Department of Education generally, they came up with that an appropriate educational program is one that yields some benefit for the children involved. I don't believe that this committee is really satisfied with that formulation.

The alternative is to say that they ought to be entitled to an equal opportunity to realize their maximum potential to that enjoyed by children without disabilities. That is the formulation that exists under some state laws that go beyond the Federal standard.

If that were the standard, then children would have to be provided with all the services they really need. At present, we know that in terms of related services, kids are getting about 40 percent of the related service they need because services are being authorized not on the basis of what the child needs but on the basis of what resources exist within that school system.

Jim talked about children being improperly classified and placed on special education programs to get services. Aside from the unfortunate and illegal action there, they are in for a rude awakening when they get in and find that the services that these well intentioned teachers thought they were going to get are not going to be provided. They are going to be placed in large classrooms, in unduly restricted environments and they are not going to get the specific services that would enable them to realize their potential. So availability of increased legal assistance would be of benefit, but without additional policy guidance and in the absence of policy guidance by the executive agency the place to look for it is in the authorizing committees with jurisdiction.

Ms. **Vargyas**. I would like to support a lot of what David just said. I think that it is in no way limited to the disability situation. I think that those concerns lie across the board. I certainly think that increased legal services funding is important to enhance the ability of legal services offices to adequately serve the population.

Of course, the income eligibility of legal services will preclude varying parts of the populations that we are talking about because those eligibility levels are so very, very low. I think another——

Chairman **Owens**. None of you mentioned legal services?

Ms. **Vargyas**. I think it is a very good question because clearly it is of a piece. I think in terms of expanding the legal services small—there is another important issue because there is private enforcement of these statutes and because attorneys' fees are available, there has been a number of problems and restrictive decisions in getting attorneys' fees to prevailing parties and I think that is an area to look at which would effectively enhance private enforcement.

But I do think that there is certainly no getting away from the key importance of assuring the effective government enforcement. In fact, in principle one of the beauties of the enforcement schemes is this combined public/private scheme which exists out there in theory but not in actuality. The fact that various members of these populations for a variety of reasons can resort or should be able to resort to a government agency either through a complaint process or through a helping structure reliance on a compliance review process is in theory a powerful enhancement to the enforcement of these statutes which I think is so important to try to get into place.

So I think that, like it or not, we need OCR. They are just not there.

Mr. **Mincberg**. I would second that. With respect to legal services in particular the problem is not only funding but the general hostility that has been expressed under a previous Administration. Because of that there are some restrictions on legal services attorneys in terms of the ability to bring class actions, for example.

In order to enable legal services attorneys to do a better job in the civil rights areas some of those restrictions would have to be lifted. There would need to be more funding of backups which can help in researching and providing assistance to legal services attorneys in the field on some of the broader issues. All that presupposes a legal services board which is committed to pushing legal services aggressively on behalf of the poor people and in terms of the two civil rights posts, we don't have a legal services board either, or nominees submitted.

I think it is particularly interesting that it is those kinds of positions that remain vacant as again we are about to enter the decade of the 1990's. I think what Ellen says about attorney fees statutes is worth considering and not only in attorneys fees but in trying to do something about court decisions that may restrict the ability of private plaintiffs to enforce civil rights statutes.

Fox example, I know there is a lot of discussion about that in the Title VII area going on right now, and I finally have to conclude again by saying what Ellen said, particularly now we do need OCR to be conducting compliance reviews, to be doing the sorts of things it ought to be doing and we hope there will be a kinder, gentler OCR as we proceed.

Ms. CANTU. Originally there were legal services attorney working on these issues, especially helping the language minority children. It has been a recent problem that they cannot because they are impact cases. They are class action cases. So I echo that testimony. They have been precluded in recent times from handling cases on behalf of children. They can't do it. They would love to, the talent is there but the restrictions are there as well. Alternatives, I have to think in terms of analogies of what has happened when we have searched state agencies that don't want to enforce the laws that apply to protecting minority children.

When we view the state agencies we do a couple of things. In terms of remedy we try to separate the technical assistance from the enforcement because it is two different attitudes that axe required and tow mind sets.

You can't coach someone and at the same time punish them. It is very difficult to do both things. So what we have asked states to do in Texas, California, and Illinois is we have tried to separate those functions, give them separate staff, separate tasks, separate objectives.

That is one alternative that is possible. Another thing that we have done is that we have set expectations of the state agencies of what penalties can be applied to offenders and violators who break the civil rights laws and we escalate the penalties from advising and warning to actually cutting off funding.

The highest penalty is you can no longer provide educational services to anybody. If you can't do it right for minority children, you can't do it right for anyone. We monitor how often those penalties are actually used. Have you ever used penalty 3 against anybody and we require clear reports from the states as to whether that has ever happened. We also monitor carefully who they refer cases to because agencies tend to refer to each other even at the state level. We don't like it when they refer to someone and it becomes a dead end so we monitor those very carefully.

If there is an agency that is effective—in Texas the Accreditation Department for the State Education agency does come down on education agencies that fall below minimum standards. They come down on people that are effective in terms of actually closing down or threatening to shut down and they get results.

Where an accreditation agency is more willing to be assertive, we don't mind when a problem is referred to them. That is another analogy that we offer if you find yourself a model that is more aggressive about it and see if you can facilitate a referral to that agency.

Mr. LYONS. I would like to offer a thought that picks up on a recommendation of the staff report having to do with OCR, the agency responsible for enforcing Title VI providing technical assistance. It is clear from your report that there has been an increase in the alleged resources devoted to technical assistance. It raises problems that Norma has already brought to your attention of mixed messages to both the recipients and beneficiaries of Federal financial aid.

Let me suggest a very straight forward solution, that is in 1964 when the Civil Rights Act was passed, Title VI was seen as the stick to bring about compliance, but included in that act was Title IV which was to be the carrot.

The title of Title IV is Training and Technical Assistance. I found it amazing, hypocritical to say the least, that during the Reagan Administration the administration kept coming up to Congress and saying either reduce the funding for Title IV, the training and technical assistance, or further, they asked that it be zero funded. You know, back in fiscal year 1980 before the Reagan Administration took office, Title IV was funded at $45.67 billion. Today it is funded at less than $24 million.

That is not only a 50 percent cut in nominal terms, that is even more when you take the effects of inflation into account.

There were people in the Department of Education that were hell bent on doing away with the training and technical assistance program for civil rights. One of their last acts was to completely reorganize the program. It covers race, sex and national origin discrimination. If you ask school districts that have, in fact, made an effort to serve students better in terms of eliminating racial, national origin, or sex discrimination where they got the best help they will tell you it is Title IV centers, yet those programs have been eroded in a significant way at the same time that resources that should be applied to compliance reviews and complaint investigations are allegedly going into technical assistance.

If you need to earmark the money, if you need to put a cap on what kind of technical assistance OCR can do in terms of its budget, fine. The concomitant of that is make sure that those resources get to the best and true technical assistance providers, the Title IV centers.

Chairman OWENS. That comment relates to my final question. Do you think there is any value in having a mass education, mass media program just to let people know that they still have certain rights and that OCR is still out there supposed to serve them, because many have lost faith in the government and enforcement of laws and have put it away into their subconscious, and the next generation doesn't know about it.

Would there be any value in having that kind of program because we have a constituency when you look at the disabled communities, 43 million people and you have the female constituency, at least half the population, you have the bilingual minority as well as the African American minority, when you add it all up you have a majority of people who will benefit from enforcement of these laws.

But you would never know it from the kind of testimony we have heard today and the kind of problems that the report is highlighting. So I just wonder would there be any value in just a massive reeducation program to let people know that they have rights and they should begin to apply pressure and become a political problem out there, that then everybody would know enough about the fact that something is wrong in order to have public officials respond to that need? In two or three words or less.

Mr. **Chavkin**. Mr. Smith talked this morning about not being able to please everybody and the fact that there are two constituencies, the school systems on one side, the recipients of Federal financial assistance, and for our focus the families that have children or adults with disabilities.

To the extent that you empower our constituency, it is going to shift the focus of OCR. It is going to increase the level of accountability. No question but that would be a critical element toward setting OCR back on its original mission.

Chairman **Owens**. When we passed the laws we thought we empowered the constituency.

Mr. **Chavkin**. We now know better.

Ms. **Vargyas**. I agree. Letting people know their rights is critically important and in some areas if people understand their rights they may be able to achieve them without resort to a bureaucracy on an informal basis.

We see that sometimes in gender cases, not some of the more difficult emerging issues I have discussed, but where there are flat out violations of the regulations sometimes knowledge is all that you need.

It can't hurt.

Mr. **Mincberg**. Such a program should be directed at educating people on what their rights are, not telling people if you have a problem talk to OCR because before OCR can become the resort of people with trouble, there needs to be some improvement at OCR. The notion of educating citizens so they have a better grip of what their rights are, I agree would be beneficial.

Chairman **Owens**. Thank you.

Mr. Hawkins.

Mr. **Hawkins**. May I by unanimous consent request that the statement made by Mr. Smith this morning as to the date of the submission of his report to us—he indicated December 15—inadvertently—he meant to say January 15, 1990, rather than December 15, and I would ask that that correction be made in the record.

Chairman **Owens**. Without objection, so ordered.

Mr. **Hawkins**. I wish to join you in commending the afternoon panel. I don't know where you got the morning panel from but you could have left it out. It would seem to me that we need to be a little more creative possibly in trying to deal with solutions to the problem.

We have an administrative agency that obviously is not doing its job, and how you can transfer an administrative function into some kind of a statutory mandate to make sure it does what it is supposed to do I guess is the question before this committee and before the Congress.

Several suggestions, I think, have been made and deserve to be considered. I am not too optimistic that legal services is going to be a practical and viable solution. I think we run into grave difficulties for the same reason that OCR is not enforcing the law and that we would never be able to get anything through this Congress that we are a part of. But it seems to me that we may be able to relate in some way the function of the Office for Civil Rights to the enforcement of Title IV, which will probably get some publicity, training and technical assistance, because we certainly aren't getting law enforcement. I am also struck by the idea that a memorandum which was issued in 1970 pertaining to equal educational opportunities for language pupils may also be an opportunity. At first I had the idea that we could, through the appropriations process, put in some mandates for the use of the money which we give to the Office for Civil Rights.

However, we may be prevented from doing that because of the lack of authorization. But if we could reintroduce a legislative proposal incorporating the memorandum verbatim that Mr. Lyons I think referred to, plus a mandate to reinstitute the semi-annual civil rights survey of school districts which I think the testimony indicated has been suspended or at least not been conducted, to mandate that survey to at least make available to the public. Put those into legislative proposals and take our chances on getting them through the Congress. It would be very difficult I would think for one to oppose the 1970 memorandum or—and the semi-annual civil rights survey and one or two other ideas, and take our chances on doing that.

I think something like that will do more than trying to cajole or to engage in interesting communication with the Office for Civil Rights. We lost that contact with EEOC, we lost it with OFCCP and I suspect we are going to have a lot of continued dialogue which is nothing more than double talk and some of us getting very angry as I am, and losing patience with some of the witnesses. I would certainly commend this committee through you, Chairman Owens, for having taken the leadership to think in terms of some of these other possibilities.

Recalling some of the witnesses we had this morning will still be continued I suppose. In another year they will still say if the same ones are there—I suspect we will have different characters to deal with. They will plead innocence or that they haven't been in office long enough to do the job and that will continue as it did with Mr. Lukas and Mr. Thomas and other civil rights agencies and all we will do is get a heart attack perhaps losing patience with them.

I would hope that we can turn our thoughts to something more constructive as a means of doing it. I think the witnesses this afternoon have given us some wonderful suggestions to follow and I think we are going to have to look in that direction and perhaps on that basis I will be willing to volunteer my services as well.

Thank you.

Chairman Owens. Mr. Hayes.

Mr. Hayes. Mr. Chairman, let me just again commend you and our chairman for pulling together this kind of hearing. I don't know if we realize it—maybe from where I sit I have a different perspective, but I see a widening of the gaps between the races, particularly in my city, Chicago, which means we don't have a lot of time to begin to put the pieces together which are going to bring some democracy here as well as to Eastern Europe.

I know it is not as bad—I say that, but when you have the Virginia Beaches and the situation that we had in New York City and, similar instances that occur in a city like Chicago, it is important what we discuss here today. I don't recall in my seven years, Mr. Chairman, of being with you, having had a panel here, five out of six witnesses who are lawyers.

I don't know whether that is good or bad, but I am willing to give you that recognition. The testimony which you have given us has been very deep and very helpful to me. It is broad based too. When you talk about democracy, you are talking about people with physical disabilities in terms of their getting an education, women getting an education, Hispanics, bilingual education and and yes the NAACP in its effort to try to hold together what we agreed to and worked out in 1964 and that we find it moving away from us now, with support from elected officials.

We have people running for public office with two or three different speeches in their pockets to fit the ethnic group that they might be talking to and that is certainly not the kind of unity we desire when we talk about civil rights.

I just want to say that maybe this is a good beginning, maybe next year, Mr. Chairman, we won't be back rehashing. But I don't feel very optimistic, I will be very honest with you.

Chairman Owens. One final question I would like to ask and that is to what degree will the program or policy or whatever it is of Choice help to solve some of the problems which you have highlighted or possibly exacerbate them and make them worse?

Mr. Mincberg. Let me comment. One of the things that we talked about in the citizens commission report is that choice programs such as magnet school programs can often lead to problems of resegregation or further division of children, so I think the answer to your question is that it depends on how the programs are administered in a way directed positively toward civil rights that are in a desegregation context the part of other remedies, they can be positive.

But if they are thrown wide open and there isn't sensitivity to discrimination concerns experience has already shown that they can be very negative.

Chairman Owens. Any other comment?

Mr. Chavkin. With regard to persons with disabilities, that is one of the elements in the equation of choice that hasn't been thought about. What we are beginning to see is increasing segregation of persons with disabilities in terms of the sites to which they are sent and classrooms in which they are placed.

In the testimony I discuss the problem of what has been happening with mainstreaming, that the likelihood is that unrestricted choice would only exacerbate the problems and result in discrimination against persons with disabilities. Minorities are disproportionately in the disabled population because of the impact of poverty increasing segregation.

Chairman **Owens**. Mr. Chairman.

Mr. **Hawkins**. In that connection, let's assume a handicapped person leaves a neighborhood school that has instituted preparations for the handicapped, and has the facilities. That individual wants to enroll in a so-called choice school which is a magnet school, maybe because of the type of curriculum that is specialized in that school, and located in that particular site—would you assume that that receiving school was going to make the modifications and be willing to accept that child?

Mr. **Chavkin**. Our experience with regard to placement these days under the current patterns is that it will be a cold day in hell before that school accommodates the needs of that child. That in fact—this is one of those areas where Section 504 imposes a much greater than the Education of the Handicapped Act does. In theory that person with a handicap would have equal access to choice as well as any other child.

What has happened now is under the EHA certain programs are placed in certain schools even though those children could be served in less restricted environments.

So the kind of segregation of persons with disabilities and minority persons that already is on the rise would only be exacerbated by increased Choice.

Mr. **Hawkins**. Do you think imposing a condition on any receiving school under a Choice proposal would be accepted by those who are advocating Choice?

Mr. **Chavkin**. Imposing that kind of condition is a lot like requiring recipients of Federal financial assistance to comply with Title VI or Title IX or Section 504. It really gets back to the point that you raised before. That is, how do we go about achieving compliance? Imposing it as a condition is not going to mean anything unless that condition is enforced.

While it is very important that additional money be placed in terms of voluntary technical assistance, as a former deputy director of the Office for Civil Rights at Health and Human Services, I knew that we would never achieve widespread, voluntary compliance without the stick of mandatory enforcement later.

To think that increasing funds under Title IV is going to solve the problem, I think, is a mistake. We have got to find some way of bringing this agency back to life because resorting to private enforcement just is not a realistic tool to see to it that the stick of ultimate enforcement is going to be realized.

In many ways, that is especially true with regard to persons with disabilities. If it is cheaper to not comply, local educational agencies, colleges, and universities are going to take the cheaper choice.

There are too few resources to serve people as it is. If they can get away with it, they are going to do it.

Mr. **Lichtman**. Choice has not been defined, as we all know. Some of us fear it means freedom of choice, which was an allusion, a deception rather than desegregation in the post-Brown period. There is a role for Choice. It applies especially in the case of language which has minority children. The trouble is there is no choice today. The parents of children who don't know English have but one choice; that is to send them to English-only schools.

In most areas of the country, there is no choice. But, it is illusory in other areas. A member of my board who is a native American was in Alaska and heard a speech to the native American educators by Secretary Cavazos. I said, "What did you think of the speech?" He said, "Everybody agreed the part of the speech that focused on the problems of Indian education and how they must be resolved were elated." Then he started talking about choice, and he said there wasn't much reaction to that.

Then again, if you live on an Indian reservation or live in the Alaskan Bush, choice really is a meaningless, vapor-like concept. There is no choice. Physical geography bars whatever people are talking about in the way of choice in those areas. That is another little caveat.

Ms. **Cantu**. I would add that the voting rights consequences need to be considered. One of the ideas behind Choice is that the free market will prevail; ineffective schools will shut down. Ineffective schools are often defined as low resource schools with low performing students on academic tests and standardized tests.

I can see a future where there will no longer be schools in minority communities because the free market will have closed those schools down.

The unempowered groups would have no choice but to attend neighborhood schools for the affluent.

I can see a future where the school boards that serve those communities would also be dissolved. An Anglo, all-white school board would control, again giving the unempowered no choice.

I can see a future where the information to make an effective choice would be available to the affluent, and the minorities would not have an informed choice. I have been an education attorney for 10 years. Decisions now are not being made, sadly, in the best interest of children. They are being made on the basis of politics.

Decisions on where to send children are being made on the socio economic ground of parents. Decisions are being made on convenience, the easiest place to drop off my kids. Those are not informed choices.

I cannot see someone with a good conscience supporting Choice unless it is informed, unless it does take into account the reality that people come from different socio-economic backgrounds. And it does take the voting rights consequences. Will we lose the representation that we have fought for since the passage of the Voting Rights Act on school boards because of Choice?

Chairman **Owens**. Any further comments?

Ms. **Young**. Yes. As my colleagues have indicated, we, too, at the NAACP view this issue of Choice with tremendous reservation. It comes down to the basic fact of the illusory quality about the issue of Choice as far as African-Americans are concerned.

Chairman **Owens**. Thank you very much.

I want to thank all the panelists. The hearing is now adjourned.

[Whereupon, at 4:05 p.m., the committee was adjourned.]

DANA ROHRABACHER
42D DISTRICT, CALIFORNIA

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Congress of the United States
House of Representatives

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SUBCOMMITTEE ON SPACE SCIENCE AND APPLICATIONS
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REPUBLICAN RESEARCH COMMITTEE
CO-CHAIRMAN, TASK FORCE ON THE STRATEGIC DEFENSE INITIATIVE
CO-CHAIRMAN, TASK FORCE ON TERRORISM AND UNCONVENTIONAL WARFARE

December 1, 1989

The Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor
2181 Rayburn H.O.B.
Washington, D.C. 20515

Dear Mr. Chairman:

Unfortunately my recess schedule and the contraction of the committee's two day hearing to one day on November 28 prevented me for testifing on H. Con. Res. 147 now pending before your committee.

I have received a copy of testimony submitted to the committee for the record by Mr. Henry Der.

Mr. Der on page 3 quotes me as saying that I am using H. Con. Res. 147 " as a vehicle to show that America has made a mistake on affirmative action." Mr. Der is supposedly quoting me at a question and answer session after a speech I gave on September 19, 1989. I have listened to a tape of that event. I did not make the statement ascribed to me by Mr. Der.

I did say that I am opposed to all quotas and later in the same answer I did use the words quoted by Mr. Der through "vehicle" but then said "to correct what we consider to be a societal mistake on the part of the United States." Apparently Mr. Der equates quotas and affirmative action and cannot believe that others can distinguish between opposition to quotas and opposition to affirmative action.

In fact I addressed the issue of affirmative action in an earlier answer in that question and answer session saying: "If affirmative action means that we are going to help people from disadvantaged backgrounds and we are going to actually work with them to develop their skills so that they can progress, now, I think that's something we should all support." Later in the same answer I said: "If affirmative action, on the other hand, means that you are lowering standards for some people on the basis of their race-- rather than trying to help a disadvantaged person build up his own skill so that he can reach those standards-- well, then it's wrong."

Since Mr. Der's entire attack on my position is based solely on this misquote, his whole arguement is unfounded.

I request that this letter be included in the record of the November 28, 1989 hearing at the beginning of the statements for the record.

Sincerely,

Dana Rohrabacher
Dana Rohrabacher
Member of Congress

DR:glc

Written Testimony
of
Henry Der, Executive Director
Chinese for Affirmative Action
on behalf of the
Asian American Task Force on University Admissions
before
House Committee on Education and Labor
November 28, 1989
Washington, D.C.

Five years ago, concerned Asian American community leaders established the Asian American Task Force on University Admissions for the sole purpose of fighting against any form of racial discrimination against qualified Asian Americans in the university admission process. The Asian American Task Force has held numerous meetings with university officials and concerned students and their parents, has provided expert testimony before legislative bodies, and has had our views about university admission quotas printed and broadcast in the mass media.

Earlier this year, Congressman Dana Rohrabacher introduced H.C.R. 147, calling on the U.S. Attorney General to investigate allegations of illegal racial discrimination in the admission policies of institutions of higher learning and on the Secretary of Education through his Office of Civil Rights to complete compliance reviews on admission policies at selected university and colleges.

To a large extent, Congressman Rohrabacher looked to the results of the work of the Asian American Task Force to formulate the rationale for H.C.R. 147. In specific, H.C.R. 147 cites the apology made by the Chancellor of University of California at Berkeley to Asian Americans for an admission process, beginning in 1984, which had a negative impact against Asian American applicants. The apology culminated many years of dialogue and debate among the University of California at Berkeley, the Asian American Task Force and the Asian American community as a whole over unfair admission policies, including changes in policies that were not fully disclosed or explained to qualified Asian American applicants.

Notwithstanding the intense involvement of the Asian American Task Force in identifying discriminatory barriers and seeking solutions to mitigate unfair treatment of Asian Americans, especially those from low-income, limited English proficient families, Congressman Rohrabacher did not deem it necessary or desireable to contact or consult with the Asian American Task Force before he drafted H.C.R. 147. Consequently, his resolution selectively focuses on certain aspects and concerns of the Asian American Task Force, while ignoring completely our steadfast recognition and support for affirmative action programs to provide equal educational opportunities for underrepresented minorities, i.e. Afro-Americans, Hispanics and American Indians in higher education. His resolution also fails to grasp the underlying complexitiesof university admissions.

On October 12, 1989, Congressman Dana Rohrabacher (R-Calif.) called a press conference in Washington, D.C. to urge Asian American students anywhere in the United States to come forward and to participate in public hearings, organized by the Republican Research Committee, if they think they have been discriminated by any university in the admission process. He also called upon Asian American organizations "to actively poll and solicit their membership in order to help us make the public and the authorities aware of any cases of college admission discrimination."

From his public statements and published articles, including his lecture and discussion at the Heritage Foundation on September 19, 1989, Congressman Rohrabacher has made three charges:

1. Several universities and colleges, including UC Berkeley, UCLA, Harvard, Stanford and Brown, have discriminated against Asian American applicants by two specific means:

   (a) setting an upper limit quota for Asian Americans;
   (b) using affirmative action programs or series of race-specific tracks for admission of underrepresented minorities, Afro-Americans, Hispanics and American Indians.

2. U.S. Department of Education's Office of Civil Rights has dragged its feet in its compliance review at UCLA and Harvard.

3. Several Asian American and non-Asian civil rights organizations and civil rights advocates in Congress have turned a deaf ear to his repeated calls for public hearings and vigorous enforcement of civil rights laws.

The Asian American Task Force feels compelled to respond to Congressman Rohrabacher's call and charges and to clarify for the community and public-at-large what issues are at stake and what appropriate course of action Asian American parents and students should undertake.

While we appreciate the willingness of any federal legislator to fight for fair admission policies and procedures anywhere in the nation, the Asian American Task Force unequivocally opposes Congressman Rohrabacher's misrepresentation, if not exploitation, of Asian American concerns and his hostility towards affirmative action programs as mandated by the law of the land. At the September 19 Heritage Foundation Forum, a member of the audience who apparently equated affirmative action programs for underrepresented minorities as "quotas" questioned Congressman Rohrabacher why he was just pushing the Asian American cause. In response, above and beyond opposing admission quotas against Asian American applicants, Congressman Rohrabacher indicated his intention to use House Concurrent Resolution 147 as a vehicle to show that America had made a mistake on affirmative action programs to assist other minority group members. The Asian American Task Force cannot and will not be party to any legislative proposal that seeks to undermine and destroy equal educational opportunities for racially disadvantaged groups in America.

For five years now, with considerable support from the Asian American community, the Asian American Task Force has worked diligently to oppose unfair admission policies and to recommend changes that will treat Asian American applicants equally, especially those who are low-income and non-native speakers of the English language. Given the diversity in admission policies and procedures from one university to another, the Asian American Task Force has been very careful to examine admission practices on a specific university campus as they affect Asian American applicants and others.

Every university or college has its own elaborate set of admission policies, standards, preferences (by no means based solely on race), and procedures. All universities and colleges, however, are required to comply with civil rights laws and the U.S. Supreme Court decision in the Bakke case which sets forth guidelines for developing legitimate student affirmative action programs. To detect wrongdoings by any one university is no simple matter. To undertake a sweeping investigation on many universities simultaneously, the kind proposed by Congressman Rohrabacher, is both impossible and irresponsible. Political grandstanding can never be a substitute for obtaining justice for unsuspecting victims and for fashioning admission policies and procedures to provide lasting protection of Asian American applicants.

The Asian American Task Force initially spent an entire year investigating and documenting unfair admission practices before it issued its report in June, 1985. It then encouraged and monitored three other major reports: 1987 California Auditor General's A Review of First-Year Admissions of Asians and Caucasians at UC Berkeley, 1989 Report of the Special Committee on Asian American Admissions of the Berkeley Division of the Academic Senate, 1989 Report of the Chancellor's Advisory Committee on Asian American Affairs. In addition, the Asian American Task Force held numerous meetings with university officials and provided expert testimony to state legislative oversight committees.

The painstaking commitment to and process of investigation and dialogue by the Asian American Task Force contributed substantially to the May, 1989 Report Freshman Admissions at Berkeley: A Policy for the 1990's and Beyond by the UC Berkeley Academic Senate Committee on Admissions and Enrollement, chaired by Professor Jerome Karabel. The Asian American Task Force embraces the ten well-articulated principles cited in the Karabel Report and applauds its recommendations for more fair, open and accountable policies and procedures. In specific, the Asian American Task Force notes UC Berkeley's commitment to treat economically-disadvantaged Asian American applicants fairly and its reaffirmation to maintain its student affirmative action program for underrepresented minority students.

Based on published statements, the Asian American Task Force has reasons to conclude that Congressman Rohrabacher has misused the complaints of the Asian American community with respect to the university admission controversy and that his proposed course of action or remedy is inconsistent with the law of the land with respect to affirmative action programs for underrepresented minority students.

As a racial minority group, Asian Americans are painfully aware of the lasting, harmful effects discrimination has upon its victims and of what must be done to correct historical and current injustices. Like other racial minorities, Asian Americans were victims of discrimination by the leading universities and colleges before the civil rights movement of the 1960's. Very few racial minorities, including Asian Americans, could get their feet into the door of these prestigious colleges. Also, like other racial minorities, Asian Americans have benefitted greatly from civil rights laws, not the least of which are the affirmative action programs designed to dismantle unfair barriers and rectify past injustices in university admission processes. Even though Asian Americans are no longer protected by student affirmative action programs, in the 1970's, Asian Americans benefitted from them to gain access to these colleges.

Page 5. Testimony of Henry Der before House Committee on Education and Labor, November 28, 1989.

Accordingly, the Asian American Task Force opposes any admission policy that favors whites and disfavors Asian American applicants so as to maintain a floor through which non-minority students will not fall. The Asian American Task Force strongly supports affirmative action programs for underrepresented minorities as our reaffirmation to the national necessity to undo past racial injustices. We will not tolerate any attempt to use the legitimate struggle of Asian Americans against unfair admission practices as a pretext to dismantle affirmative action programs sanctioned by the U.S. Supreme Court.

The U.S. Department of Justice and the U.S. Department of Education's Office for Civil Rights have the primary responsibility to enforce Title VI of the Civil Rights Act of 1964, to ensure that no institution of higher learning is permitted to practice racial discrimination, and to secure compliance by universities and colleges with the Bakke decision. However, the Asian American Task Force opposes Congressman Rohrabacher's attempts to re-interpret civil rights laws and U.S. Supreme Court decisions. We object to the manipulation of two major law enforcement agencies and of the underlying concerns of the Asian American community to satisfy what is largely a partisan political agenda to eliminate affirmative action programs across the board. Civil rights advocates and organizations have wisely turned a deaf ear to his attempt to use Asian Americans to subvert the law of the land.

Unless Congressman Rohrabacher fully discloses the true intent of his proposed public hearings, the Asian American community has no legitimate reason to participate and all civil rights organizations should oppose openly his largely political partisan agenda to destroy affirmative action programs. The Asian American Task Force calls on the U.S. Congress and President George Bush to disassociate themselves publicly with the position of Congressman Rohrabacher.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

JAN 16 1990

Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Hawkins:

I appreciated the opportunity to meet with you and members of the House Committee on Education and Labor on November 28, 1989, to present information about the operations of the Office for Civil Rights (OCR) and to address your concerns. As promised at the hearing, I am sending you OCR's response to each of the major findings and recommendations of the "Committee on Education and Labor Staff Report" issued in December 1988. The report's findings and recommendations are presented at the top of each page, followed by OCR's response.

As I noted in my testimony on November 28, we determined that the report should be considered at the same time as the comprehensive management review process that OCR had already scheduled and begun. The report's findings were useful in directing our attention to certain areas during the review. As a result of the information we gathered, it has become clear that there are refinements that can be made to help improve OCR's enforcement efforts. A summary of the information we obtained during the comprehensive management review is included, where appropriate, in the response to each finding.

However, it is also clear that many of the report's criticisms are inaccurate or misleading. The report does not accurately take into account the effects on OCR of certain major legal changes (e.g., the *Grove City* decision, the Civil Rights Restoration Act, and *Adams* case deadlines), nor does it display a sound understanding of OCR's enforcement procedures. For example, it concludes from the distribution of complaints that OCR has not vigorously enforced the rights of women and minorities, when in fact OCR has no control over the kinds of complaints that it receives. Other uses of statistics in the report are similarly flawed.

Finally, one significant issue raised at the hearing that is not directly answered in our attached response is whether OCR has sufficient resources to carry out its mission. Our approach in the past has been to work within the budgets we have been given and to put forth our best efforts to complete all required activities efficiently and effectively. We have not yet completed the assessment of our FY 1990 workload in comparison with the budget available to us. However, when we do, we will then determine what activities OCR will carry out beyond those required by statutory mandates, such as complaint investigations, monitoring, magnet school reviews, methods of administration reviews, and higher education desegregation reviews. During my tenure as Acting Assistant Secretary, OCR has used all the funds provided to it. OCR will continue to use all the available financial resources allotted to it, as well as search for more efficient and effective ways to carry out its mission. You will note that there was an increase in

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OCR's FY 1990 budget over FY 1989. This clearly reflects this Administration's continued commitment to enforce the civil rights laws.

It has become clear that we are at a significant point in the history of civil rights enforcement and need new ideas, new solutions, and rededicated energy to ensure that we build upon our past gains. The Secretary and the Department are fully committed to the enforcement of civil rights laws and we are convinced that OCR has the dedication, talent, and will to maintain and improve upon its successful performance.

Sincerely,

William L. Smith
Acting Assistant Secretary
for Civil Rights

Enclosure

OFFICE FOR CIVIL RIGHTS

RESPONSE TO THE

COMMITTEE ON EDUCATION AND LABOR STAFF REPORT

ENTITLED

INVESTIGATION OF THE CIVIL RIGHTS ENFORCEMENT ACTIVITIES

OF THE OFFICE FOR CIVIL RIGHTS

U.S. DEPARTMENT OF EDUCATION

100TH CONGRESS, SECOND SESSION (DECEMBER 1988)

Office for Civil Rights
Response to the
Committee on Education and Labor Staff Report
entitled
Investigation of the Civil Rights Enforcement Activities
of the Office for Civil Rights
U.S. Department of Education
100th Congress, Second Session (December 1988)

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Office for Civil Rights
Response to the
Committee on Education and Labor Staff Report
entitled
Investigation of the Civil Rights Enforcement Activities
of the Office for Civil Rights
U.S. Department of Education
100th Congress, Second Session (December 1988)

Section I.

Background

In December 1988, the Office for Civil Rights (OCR) received the final version of the Staff Report (Report). For several months before that date, OCR had been considering a comprehensive management review process that would look in depth at regional and headquarters operations. In November 1988, those plans were put into place. OCR carefully considered all of the findings and recommendations in the December 1988 Report as it conducted its management review process.

Set forth below as part of Section I is an overview of OCR's management review process and a summary of the follow-up activities. Section II of this document provides OCR's detailed responses to the Major Findings of the December 1988 Report. Section III sets forth OCR's responses to the Report's recommendations. The Committee's findings and recommendations are presented at the top of each page, followed by OCR's response.

OCR's Management Reviews

In December 1988, OCR initiated an extensive evaluation of its management operations. A team of senior regional and headquarters managers conducted comprehensive reviews of the management and program operations of the 10 regional offices and of the headquarters office operations. The management reviews were initiated by former Assistant Secretary LeGree S. Daniels, as a follow-up to her visits to OCR's regional offices earlier in the year, and as a result of her interest in identifying and addressing any areas where regional operations could be enhanced.

The major findings and issues identified by the regional Management Review Team are as follows:

A. The Team was pleased with the overall commitment to the work of OCR exhibited by the Regional Directors and regional staff. OCR's regional offices as a whole are managed by energetic and dedicated people, most of whom work many extra hours to ensure the goals and objectives of the Office are met. Regional managers have a wealth of experience and knowledge on programmatic and management issues within OCR. Their views should be solicited and considered on all significant decisions affecting Regional office work and particularly in the resolution of issues arising from the work of the Team.

B. The Team found that OCR's systems to ensure integrity in case processing are in place and being implemented by all regional offices. Overall, the quality of case investigations is very good, as reflected in case files and letters of findings (LOFs). Conscientious and successful efforts are being made to meet OCR's Investigation Procedures Manual (IPM) requirements in all 10 regional offices.

C. Some of the "integrity" systems should be re-examined and substantially revised. Portions of the Quality Control/Case Assessment program are redundant; the program needs reconceptualization. The Uniform Management System Procedures (UMSP) are meeting the purpose for which the system was established, but should be further refined to eliminate some duplication and excessive recordkeeping requirements.

D. Regional productivity, as reflected in the rates for meeting due dates and closing complaints, is very high in all of the regions. However, the morale of regional managers is affected by such factors as an increasing workload; the pressure to meet 100% of case processing time frames; the rigidity of current case processing time frames; the extensive levels of review of work products; the lack of flexibility in many case processing procedures; the insufficient time to do complex compliance reviews or to participate in training programs; the numerous reporting and administrative requirements; and the age and condition of equipment. In general, regional managers feel that they have little control over their workload, limited planning opportunities, and virtually no discretionary time for staff development activities.

E. The above concerns are symptomatic of several larger issues that must be addressed and resolved to enhance substantially the operations of the regional offices, and to increase significantly job satisfaction for regional managers and staff. The Team's evaluation of information obtained during the regional reviews raised questions that pointed to the following overriding issues:

1. whether OCR has clearly defined the programmatic goals and objectives it expects to accomplish as an office and the role each of the program activities should have in meeting those goals and objectives;

2. whether the current regional office organizational structure is the most efficient and effective way of carrying out OCR's goals and objectives;

3. whether OCR has sufficiently recognized the importance of the relationship of long-range development of human resources to increased productivity, e.g., increased innovation, improvement in work quality, and improved morale;

4. whether OCR's procedures for case processing are sufficiently flexible to allow regional managers to apply their expertise and discretion to improve the efficiency of regional operations, while ensuring a high-quality work product;

5. whether OCR has clearly defined the relationship between headquarters and the regional offices, including the areas where headquarters is to provide a support function to regional offices, the areas where headquarters carries out a directive or oversight function, and the role each headquarters unit has with regard to each of these functions; and

6. whether OCR has clearly identified the short- and long-term technological needs of the regional offices in terms of automated data processing hardware, software, training of staff to use technologically sophisticated equipment (hardware and software), and effective maintenance of such equipment, and whether the current OCR technology plan is consistent with regional office needs.

Follow-up to the Management Reviews

Following the regional management reviews, OCR took immediate action to issue new guidance to improve OCR's compliance review program, including instructions to the regional offices to conduct additional reviews of expanded scope and to increase the percentage of Title VI compliance reviews. OCR also established several work groups comprised of regional and headquarters managers and instructed them to develop proposals and recommendations for addressing the significant issues identified by the Management Review Team. Each workgroup made presentations to OCR's senior managers on these and other issues in a week-long management Roundtable in late October and early November 1989. OCR is now in the process of implementing those recommendations where consensus was reached during the Roundtable and is continuing to develop the others (such as revision of the Investigation Procedures Manual and modification of the Quality Control/Case Assessment program). Another major follow-up activity to the regional management reviews was extensive effort related to regional workload planning for FY 1990. The total regional work load has now been identified and a complete assessment has been made of the work activities to be accomplished in FY 1990.

In addition, the Management Review of OCR's headquarters operations has identified a range of issues and recommendations. OCR intends to give high priority to making appropriate changes based upon the recommendations. A major priority identified by OCR for immediate follow-up is the development of a strategic planning capability in OCR to ensure that the resources of the agency are always directed to essential activities of the highest priority. OCR continues to investigate complaints, carry out a wide variety of compliance activities, and complete the numerous other activities related to its mission.

Section II. Responses to Major Findings

OCR's response to each of the Major Findings in the Report is provided in this section.

MAJOR FINDING

1. *A review of OCR's case processing statistics reveals that the agency has not vigorously enforced laws protecting the rights of women and minorities in education since 1981.*

   (a) Fifty-eight percent of complaint investigations closed between Fiscal Year (FY) 1983 and FY 1988 were concluded with a finding of "no violation" of civil rights statutes. During FYs 1981-1988, OCR initiated 9,768 complaint investigations, the majority of which related to handicap discrimination. Only 15 percent of the complaints involved race discrimination allegations, 17 percent related to gender discrimination and 3 percent to national origin discrimination.

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The evidence does not support this finding. OCR has competently enforced laws protecting the rights of women and minorities in education. All complaints are processed in accordance with sound procedures and appropriate legal standards of proof. All complaint investigations are thoroughly reviewed by regional managers and legal staff, and each case file is reviewed and approved by the chief regional civil rights attorney, ensuring its legal sufficiency.

OCR has no control over the kinds of complaints it receives or the merits of those complaints. Complaints alleging discrimination on the basis of handicap outnumbered complaints alleging other types of discrimination in each fiscal year since 1981. OCR also received many complaints that alleged discrimination on multiple bases, e.g., race and handicap, which were not included in the figures cited by the Committee. Furthermore, OCR's jurisdiction was substantially limited for more than 4 of the 8 years covered by the Report because of the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). During that period, OCR jurisdiction was easily established in elementary and secondary special education programs because of the large number of school districts that receive Department of Education funds under the Education of the Handicapped Act. The *Grove City* decision made it difficult for OCR to enforce its statutes in other areas of edcuation. The 1988 Civil Rights Restoration Act eliminated the jurisdiction limitations imposed by the *Grove City* decision.

Attached are four Tables (Tables 1-4) providing updated information on complaint receipts between FY 1981 and FY 1989, including data on the basis of the alleged discrimination, data on complaints in which OCR initiated investigations, and data on findings made in the complaints investigated during that period.

MAJOR FINDING

1. (b) While handicap- and sex-based complaint investigations were the most likely to be closed with a finding of "violation corrected," age- and race-based complaint investigations were the most likely to be concluded with a finding of "no violation." Since OCR was established as a result of the passage of the Civil Rights Act of 1964, which was originally intended to address the problem of race discrimination, OCR's failure to devote adequate attention to race-based complaints constitutes a violation of its mandate. As the elderly population relies upon the national government to protect its rights as well, it is no less a travesty for OCR to resolve age discrimination complaints with a finding of "no violation", if indeed the complaints filed were meritorious.

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The facts do not support this finding. No complaints are ever ignored by OCR. OCR devotes the same amount of attention to race- and age-based complaints as it to does complaints filed under Section 504 or Title IX. As noted previously, all complaints are processed in accordance with the same procedures and appropriate legal standards of proof. All cases are thoroughly reviewed by regional managers and legal staff, and each letter of findings (LOF) is reviewed and approved by the regional Chief Civil Rights Attorney, ensuring its legal sufficiency.

OCR has no control over the merit of complaints, and the percentage of complaints with violations may change over time or vary by type of complaint. For example, the high percentage of sex-based complaints that resulted in findings of violations may be attributed in large part to the fact that a single complainant filed nearly 1,900 complaints between FY 1981 and FY 1989 alleging discrimination in the administration of student health insurance plans at postsecondary education institutions. OCR found that a significant number of postsecondary institutions *were* discriminating on the basis of sex in their provision of student health insurance plans. As a result of OCR's enforcement efforts, this compliance problem has been virtually eradicated nationwide.

MAJOR FINDING

1. (c) The number of compliance reviews initiated between FY 1983 and FY 1988 appears generally to be in decline. The majority of reviews initiated addressed issues of handicap discrimination. Only 162 of the 1,378 reviews conducted during those years involved race discrimination issues, and 46 related to national origin discrimination. Two-hundred eighty-three reviews involved gender discrimination.

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OCR compliance activities, including higher education desegregation, making eligibility determinations of applicants for grants under the Magnet Schools Assistance Program, and assessing implementation of vocational education Methods of Administration plans, involve significant Title VI compliance and enforcement efforts. The Report fails to take into account these efforts. Also, OCR's ability to conduct a higher number of compliance reviews is directly related to its increasing complaint receipts and the heavy workload engendered through numerous other required compliance activities, including monitoring, making eligibility determinations of applicants for grants under the Magnet Schools Assistance Program, Vocational Education Methods of Administration reviews, and higher education desegregation reviews. Although the number of compliance reviews initiated by OCR increased in FY 1988 to 247, OCR was able to initiate only 138 reviews during FY 1989 (Table 5) because of a significantly higher complaint workload since passage of the Civil Rights Restoration Act.

Following completion of the regional management reviews, OCR underwent an extensive planning process to determine its workload priorities and available staff resources for FY 1990 compliance activities. Indications are that the continued expected increase in the complaint workload and a greater emphasis on monitoring, critically needed staff development, and conducting a larger number of complex compliance reviews, will result in conducting from 105 to 128 compliance reviews in FY 1990.

With regard to the types of compliance reviews OCR has conducted, the Report does not accurately reflect the number of compliance reviews that addressed race, national origin, and sex discrimination issues because multiple jurisdiction reviews were not factored in. Tables 6 and 7 present data on the bases addressed through compliance reviews conducted between FY 1983 and FY 1989 (automated data are not available for FY 1981 and FY 1982). In addition, many Section 504 and Title IX reviews result in corrective action that affects large numbers of minority students. For example, OCR's enforcement action against the Chicago Public Schools under Section 504 resulted in a corrective action plan that assisted the high percentage of minority students, as well as nonminority students, in the District's special education program.

On August 30, 1989, OCR issued additional guidance to assist the regional offices in effectively planning and carrying out substantive compliance reviews addressing a broad range of issues. On the basis of the information submitted in regional compliance review plans, it is clear that the regions are planning to increase substantially the percentage of Title VI reviews that they will be conducting in FY 1990.

MAJOR FINDING

1. (d) Since 1981, OCR's policy has been to close most of its complaints and compliance reviews in which violations of the law have been found by means of a Letter of Findings (LOF) indicating that the violations cited have been corrected *even when the recipient school district has only promised that it will take action to correct the violations.* During FYs 1983-1988 (May 5, 1988), OCR closed 40 percent of all investigated complaints and 72 percent of all compliance reviews with a "violations corrected" LOF.

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The assumption on which this finding is premised -- that it is inappropriate for OCR to negotiate voluntary corrective actions when a violation has been found -- is incorrect. Each of the civil rights statutes that OCR enforces requires OCR to engage in voluntary negotiations to achieve compliance. Since 1981, OCR has used violation corrected LOFs as an efficient and effective complaint processing procedure. A violation corrected LOF obtains the same legal remedy as would be obtained by issuing a violation LOF and then obtaining corrective action. Further, pre-LOF settlements obtain appropriate remedies much sooner than can be obtained post-LOF, where the parties are forced into adversarial positions. All regional offices are required to ensure that a violation corrected LOF *states that a violation has occurred* and that appropriate remedial action to correct the cited violation has been agreed upon by OCR and the recipient. The terms of a corrective action plan must be stated in writing and must include, at a minimum, the specific acts or steps the recipient will take to make policy or procedural changes to correct the violation; the timetable for implementing the remedy; and a description and timetable for submission of documentation that the recipient will provide as the remedy is implemented. All corrective action plans submitted by recipients are carefully reviewed and approved by the regional legal staff and the Chief Regional Civil Right Attorney to ensure they meet appropriate legal standards. Furthermore, *corrective action plans accepted by OCR are monitored to ensure implementation and all monitoring activities are documented in the case file.* If a recipient fails to take the agreed-upon corrective action, OCR will issue a new LOF and take whatever enforcement action may be needed to bring the recipient into compliance with the law.

MAJOR FINDING

1. (e) During the same period, OCR closed 99 percent of its compliance reviews by either finding no violation or reaching a settlement prior to issuing a Letter of Findings.

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This finding is misleading in combining findings of no violations with findings of violations in which voluntary corrective actions have been negotiated. The two are fundamentally different. Most of the violations found in OCR's compliance reviews are resolved pre-LOF and result in violation corrected LOFs. Corrective action *is* secured and in a timely fashion. The corrective actions obtained through pre-LOF negotiations are in no way inferior to corrective actions obtained through adversarial proceedings and secure the appropriate remedies for beneficiaries much sooner. As noted earlier, a violation corrected LOF states that a violation has occurred and that appropriate remedial action to correct the cited violation has been agreed upon by OCR and the recipient. All corrective action plans are reviewed and approved by regional legal staff and the Regional Chief Civil Rights Attorney to ensure that they meet appropriate legal standards. Furthermore, corrective action plans accepted by OCR are monitored to ensure implementation.

The phrase "reaching a settlement" also is misleading. OCR obtains corrective action for all violations of the law. All corrective action plans must satisfy the legal standards established by the statutes and regulations enforced by OCR. Violations were found in 41 percent of the complaints OCR investigated between FY 1981 and FY 1989 and in 72 percent of the compliance reviews initiated between FY 1983 and FY 1989 (Table 8). [OCR does not have automated data on the number of violations found in compliance reviews conducted in FY 1981 and FY 1982.] In most instances, compliance reviews cover broader discrimination issues than complaints and often affect significantly larger numbers of individuals than complaint investigations.

MAJOR FINDING

1. (f) If voluntary compliance cannot be secured, OCR may pursue enforcement through administrative fund termination proceedings or by referring the case to the Department of Justice. In FYs 1981-1988, however, OCR instituted only 40 administrative enforcement actions, 22 of which were instituted in 1984. Only 24 cases were referred to the Department of Justice for enforcement.

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The Committee's finding addresses enforcement only in its narrowest sense, that of formal administrative litigation. Regardless, the actual number of such proceedings is not a measure of OCR's effectiveness. The goal of civil rights enforcement is to achieve compliance with the civil rights statutes and institute enforcement proceedings only when efforts at voluntary compliance fail. All of OCR's investigative and negotiation efforts are part of a process to ensure that the civil rights laws are enforced. A thorough investigation and an effective settlement agreement that result in compliance with the law are as effective in achieving that objective as initiating lengthy formal proceedings.

MAJOR FINDING

1. (g) On a positive note, the number of complaints missing at least one *Adams* time frame has declined on an annual basis since FY 1984. It is not clear, however, whether these data have been affected by the reported efforts of some regional offices to "backdate" the time spent in processing complaints, or whether these cases were closed with minimal, inadequate investigations in order to meet the time frames.

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OCR has increased its rate of meeting all case processing time frames from 78 percent in FY 1984 to *95 percent* in both FY 1988 and FY 1989 (Table 9). The percentage of time frames met for LOFs has also remained very high during the past 2 years; *91 percent* of LOF time frames were met in both FY 1988 and FY 1989.

OCR's significant increase in meeting its case processing time frames is in no way connected to the small number of case documents that reportedly were "backdated" in 1986. After the apparent problem with "backdating" of documents was identified in an extremely small number of cases (through internal audit in 1986), a memorandum entitled "Signing of Documents" was transmitted to all OCR staff on March 4, 1987, addressing the significant ethical responsibilities involved in the preparation and approval of documents issued by OCR. No instances of "backdating" have been identified since that time. The Management Reviews found that OCR's integrity systems are in place in every regional office and are being carried out. (These integrity systems include the Quality Control/Case Assessment program and the Uniform Management System Procedures.)

The Management Reviews of regional operations in FY 1989 determined that regional offices have maintained a high quality of case work while meeting the time frames and that this substantial effort has occurred within the context of an increasing complaint workload and an increased workload in a number of other areas. The implementation of improved case management techniques contributed to this progress. Regional managers and staff also have worked excessively long hours, delayed annual leave, and made numerous other personal sacrifices.

MAJOR FINDING

1. (h) Complaints closed because the complainant withdrew the complaints appear to have risen since FY 1982.

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This statement is incorrect. The percentage of complaints that were withdrawn without benefit to the complainant has remained relatively constant (i.e., approximately 4 percent) since FY 1981 (Table 10). Similarly, the percentage of complaints that were withdrawn after change was achieved that benefited the complainant (e.g., through the Early Complaint Resolution process) has remained relatively constant (i.e., an average of 11 percent) (Table 11).

MAJOR FINDING

2. *During the period FY 1982 through FY 1988, the Reagan Administration sought major budgetary and staff reductions for OCR, arguing that it could "do more with less."* In 1982, $51 million were requested by the Administration. Since then, the agency's budget recommendations have significantly declined. By FY 1989, OCR's budget request was only $41 million.

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The Report is correct in noting that the overall budget requests for OCR have decreased since 1982; however, five of the nine budget requests since 1982 represent increases over the requests for the preceding years. The budget estimates transmitted to Congress for fiscal years 1983, 1984, 1987, and 1989 represented decreases from the budget estimate for the immediately preceding fiscal year. The five remaining estimates (fiscal years 1982, 1985, 1986, 1988, and 1990) represented increases. In addition, for 4 of the 8 fiscal years from FY 1982 to FY 1989, Congress appropriated funding that was less than the amount requested in the President's Budget.

The FY 1990 President's Budget Request of $45,178,000 for OCR was an increase of 8.5 percent over the FY 1989 funding level of $41,635,000. The FY 1990 appropriation of $44,572,000 is an increase from the preceding fiscal year. This will provide OCR with more opportunities to handle increased complaints and compliance reviews. The following table presents data on appropriations, staffing, and selected workload for FYs 1981-1989.

Table of Appropriations, Staffing, and Selected Workload

FY	*Appropriation*	*Employment Ceiling* [1]	*FTE Usage*	*Complaints On Hand* [2]	*Compliance Rev. Starts*
1981	$46,915,000	1,098	1,099	4,940	138
1982	45,038,000	1,026	978	3,457	208
1983	44,868,000	970	941	3,137	287
1984	44,396,000	1,046	907	2,778	220
1985	45,000,000[3]	970[4]	913	3,056	288
1986	44,580,000[5]	907[6]	843	3,669	197
1987	43,000,000[7]	840	807	2,851	240
1988	40,530,000[8]	820	808	4,194	247
1989	41,635,000[9]	820	789	4,631	138

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[1] For FY 1981 and FY 1982, these numbers represent full-time permanent staff positions; the figures for FY 1983 through FY 1989 represent full-time equivalent staff positions.

[2] Includes current year complaint receipts and complaints pending from the previous fiscal year. Data for FY 1985 through FY 1989 have been updated.

[3] The FY 1985 funding level of $45,000,000 included $420,000 that was reserved from obligation under Section 515 of the Treasury-Postal Service Appropriations Act of 1985.

[4] The Justifications of Appropriation Estimates for the Committees on Appropriations, FY 1986, ED (Vol. II), revised the FY 1985 staffing level for OCR to 907.

[5] The FY 1986 appropriation of $44,580,000 included $945,000 that was reserved from obligation under Section 515 of the Treasury-Postal Service Appropriations Act of 1986 and $1,876,000 that was withheld to meet the requirements of the Balanced Budget and Emergency Deficit Control Act of 1985.

[6] The Justifications of Appropriation Estimates for the Committees on Appropriations, FY 1987, ED (Vol. II), revised the FY 1986 staffing level for OCR to 860. However, the Department subsequently increased OCR's FY 1986 ceiling from 860 to 870.

[7] The FY 1987 funding level of $43,000,000 included $4,000 that was withheld to meet the requirements of the Supplemental Appropriations Act of 1987.

[8] The FY 1988 funding level of $40,530,000 included $154,000 that was withheld from obligation to meet the requirements of Section 512 of P.L. 100-202, a full-year continuing resolution.

[9] The FY 1989 appropriation of $41,635,000 included an adjusted appropriation of $40,845,000 and a supplemental appropriation of $790,000.

MAJOR FINDING

3. *Despite such budget cuts, OCR has failed to expend all of the monies allotted to it and has allowed between .4 percent and 6.1 percent of its annual appropriation to lapse to the U.S. Treasury.*

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Over the last several years, the amount of lapsed funds has decreased steadily. Department accounting records showed an unexpended balance of $62,000 as of the last day of FY 1988. Updating of the accounting records during the following months resulted in a zero balance for FY 1988. Similarly, for FY 1989, OCR anticipates that all or nearly all funds will be expended when all transactions involving FY 1989 funds are completed.

MAJOR FINDING

4. *The number of full-time-equivalent (FTE) OCR employees has drastically dropped in recent years, from 1,099 employees in FY 1981 to 820 in 1988.* OCR has therefore, lost approximately 25 percent of its staff since 1981.

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Following the passage of the Civil Rights Restoration Act, OCR has experienced an increase in case workload. Although OCR's staff has been reduced since FY 1981, OCR has continued to process complaints in an increasingly timely manner and carry out a range of compliance activities, such as monitoring recipients' compliance with corrective action plans, conducting substantive compliance reviews on a variety of issues, monitoring states' compliance with their approved higher education desegregation plans, evaluating states' compliance with their vocational education Methods of Administration plans, determining the compliance eligibility of school districts to receive Magnet Schools Assistance Program funds, and delivering technical assistance to recipients and beneficiaries.

During the hearing, I indicated that I would provide data on OCR's FTE figures during the past few months. The table below presents the data requested:

Date	*FTE*
8/26/89	787
9/23/89	785
10/21/89	788
11/18/89	800
11/28/89	801
12/31/89	820

Note: After September 30, 1989, these data represent projected annualized FTE for FY 1990.

MAJOR FINDING

5. *The Grove City v. Bell decision, handed down by the U.S. Supreme Court in March of 1984, had a devastating impact upon OCR's enforcement effort.* Numerous cases were cited by the regional office staff, in which complaints of discrimination could not be investigated because OCR lacked jurisdiction over the program or activity receiving Federal financial assistance. In FYs 1984 through 1986, OCR closed in whole or in part 674 complaint investigations and 88 compliance reviews because of *Grove City's* limitations, and narrowed the scope of 72 compliance reviews. The *Grove City* decision has since been super[s]eded by the Congress' override of the President's veto of the Civil Rights Restoration Act in March of 1988.

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During the 49 months in which the *Grove City* decision was in effect, the percentage of complaints that were closed because OCR lacked jurisdiction increased substantially, particularly in the area of postsecondary education (Table 12). However, the limitations on OCR's jurisdictional authority imposed by the *Grove City* decision were eliminated with passage of the 1988 Civil Rights Restoration Act. The Act was not retroactive; it applied only to complaints of discrimination that occurred after March 22, 1988, the date the Act was passed. On April 7, 1988, OCR regional offices contacted all complainants whose complaints were closed or narrowed because of *Grove City* limitations. The complainants were advised that, if they believed the discrimination alleged in their previous complaints continued to occur or had occurred again after March 22, 1988, they should inform the regional office. Of the complaints that had been closed or narrowed because of *Grove City* limitations, 521 complaints were refiled with OCR, including 431 from a single complainant.

MAJOR FINDING

6. *Exacerbating the effect of Grove City was the fact that the Department of Education had no reliable data on the actual allocation of Federal funds awarded by it to the recipient institutions.* In most instances, OCR staff had to ask the school districts to inform them as to which programs or activities received the assistance. Staff received no guidance from headquarters regarding the available data for tracing the allocation of Federal funds. Consequently, the time required to trace the funding to the specific program or activity, and thereby, to establish jurisdiction, would often absorb 45 or more days, severely lessening the time remaining to investigate and resolve a complaint.

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The Department of Education maintains Federal financial assistance information in two primary recordkeeping systems that assist OCR staff in establishing jurisdiction. Information on direct grants is maintained in the Federal Assistance Awards Data System (FAADS). Information on state-administered funds to recipients is part of the General Education Provisions Act (GEPA) Section 406A data collection, but the data available to OCR are at least a year old. In addition, OCR has access to the Office of the Inspector General's Audit Universe file, which also contains information on Federal financial assistance provided by the Department to recipients. In fact, OCR headquarters has provided necessary guidance to the regional offices on obtaining Federal financial assistance information. Quarterly printouts of FAADS data are distributed to the regions. In addition, both the FAADS and GEPA files have been placed in regionally accessible computer files, and appropriate guidance on using the files has been distributed. Guidance on use of the Audit Universe File also has been disseminated.

The requirement to identify program-specific funding under the constraints of the *Grove City* decision ended with the passage of the 1988 Civil Rights Restoration Act, which has virtually eliminated the difficulties encountered in establishing jurisdiction while the *Grove City* decision was in effect.

MAJOR FINDING

7. *The case processing time frames ordered by the Federal district court in the Adams litigation were interpreted in a way which provided additional pressure upon OCR staff to close cases without in-depth investigations and with possibly inadequate settlements.* The Reagan Administration forced OCR staff to establish jurisdiction, to investigate a case, and to seek voluntary settlement within 105 days, instead of the 195 days prescribed by the court.

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The finding that OCR has failed to conduct in-depth investigations and negotiate appropriate settlements is incorrect. In 1981, OCR initiated pre-LOF negotiations procedures to enable recipients to correct violations of the civil rights laws at an earlier stage in the enforcement process. The process is very successful in providing timely and effective corrective action where violations of the law are identified. Moreover, OCR is statutorily required to negotiate voluntary settlements. We note that OCR has been successful in meeting the time frames even while ensuring that cases are closed based on thorough, in-depth investigations and, in cases where violations are found, only with corrective action plans that effectively remedy the violations. However, OCR is currently reviewing its internal procedures to make this process more efficient. OCR is about to make minor modifications to the time frames to provide regional managers with additional flexibility in processing cases.

MAJOR FINDING

8. *As a consequence of the narrowing of the time allotted to investigate a complaint or conduct a compliance review, OCR regional office staff indicated that the scope of issues for investigation is being narrowed.*

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The Regional Management Reviews found that OCR's regional offices are preparing case investigations with a great deal of thoroughness and integrity. OCR staff prepare detailed investigative plans and detailed investigative reports for each complaint and compliance review investigation. These are carefully reviewed and approved by regional managers and legal staff. The letter of findings sets forth the issues investigated and the evidence on which the findings are based. All issues raised by a complainant that are timely and are covered by the statutes OCR enforces are investigated.

OCR has found that regional offices tend to select a high percentage of compliance reviews with narrower issues that can be completed within the current time frames. OCR has always had the discretion to determine the scope of its compliance reviews and to decide which issues will be examined on a recipient-by-recipient basis.

Following the regional management reviews, OCR issued new guidance to improve OCR's compliance review program, including instructions to the regional offices to conduct more expanded scope reviews and to increase the percentage of Title VI compliance reviews. It should be noted that many Section 504 and Title IX reviews result in corrective action that affects large numbers of minority students. For example, OCR's enforcement action against the Chicago Public Schools under Section 504 resulted in a corrective action plan that assisted the high percentage of minority students, as well as nonminority students, in the District's special education program.

MAJOR FINDING

9. *Several OCR staff also admitted that they encouraged complainants to withdraw complaints in order to decrease the complaint load and to diminish the pressure to investigate and close cases within the Adams time frames. As an alternative, staff would urge complainants to "clarify" their allegations in order to narrow the scope of the complaints.*

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OCR's Investigation Procedures Manual provides specific guidance to the regional offices on all case processing procedures, including case closures. Any action by OCR staff to encourage complainants to withdraw their complaints, either to decrease OCR's workload or to meet time frames, would be in direct conflict with those procedures. The isolated past incidents that relate to this finding were dealt with promptly and appropriately by the assistant secretaries who were in charge of OCR when the incidents occurred.

With regard to the issue of "clarification" of allegations, OCR regional offices are required to acknowledge receipt of a complaint within 15 days, and, if the complaint is deemed incomplete, the complainant must be informed of the particular elements missing in the complaint and the information and steps needed to complete the complaint. Such clarification of complaint issues with the complainant is a sound investigative procedure.

MAJOR FINDING

10. *In one regional office, staff admitted that incoming complaints had been "logged in" on the following Monday in order to delay the time in which the Adams time frames began.*

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The only evidence of this practice ever occurring in OCR was contained in a 1986 report prepared by the Department's Office of Inspector General and involved only the Boston regional office. OCR then conducted its own investigation of this office and, as a result of this action, all of the employees responsible retired, resigned, or were fired. The Management Review Team reviewed in depth the implementation of regional procedures for logging in complaints and related activities instituted by OCR at that time. The Team found that all case integrity systems were in place and being carried out by each regional office.

MAJOR FINDING

11. *Letters of Findings which cite schools for violations of the civil rights acts must be first approved by the OCR National Office. Regional office staff consistently criticized the inordinate time taken by headquarters staff to approve the issuance of violation LOFs.* OCR admitted that of the LOFs sent to headquarters for approval which had not been settled in the interim with "violation corrected" letters, all had been in headquarters for a period generally exceeding 180 days in order to "ensure that the Letters of Findings were fully supported by the evidence and accurately reflected current policy."

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In virtually all cases where a violation of the civil rights laws has been determined, the regional offices are able to secure corrective action from the recipient and issue violation corrected letters. In the small number of cases where a regional office is dealing with a recipient who refuses to settle a case voluntarily, the case is referred to headquarters. The small number of cases in which due dates are missed fall well within the exceptions to the time frames that were allowed under *Adams* and that remain under OCR's current case processing time frames. These cases almost always involve difficult, complex issues that must be thoroughly reviewed to ensure consistency with OCR policy and the applicable legal standards. This is a time consuming process. However, OCR is committed to ensuring that, when we issue an LOF detailing violations of the civil rights laws and have been unsuccessful in securing voluntary remedial action, we have sufficient evidence and a thorough legal analysis that will permit us to enforce compliance through the initiation of administrative enforcement proceedings or referral of the case to the Department of Justice for the initiation of court action.

OCR is currently reviewing the process for referral to headquarters of violation LOFs to determine whether the procedures for such referrals should be modified.

MAJOR FINDING

12. *Of the 112 draft [violation] LOFs submitted to headquarters in 1987 through June 1988, only seven were approved. The vast majority (92) were resolved with a "violation corrected" LOF.*

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This finding erroneously implies that a violation corrected LOF is inadequate enforcement. OCR's goal is to ensure that the recipient complies with the law when a violation of any civil rights statute has been identified. Of the several methods for achieving this goal, voluntary compliance through a pre-LOF settlement agreement consistently has proven the most successful in achieving compliance through corrective action. These LOFs cite the violations found and the legal standards applied. This process reduces the adversarial relationship by providing the recipient with an opportunity to correct the violations by submitting to OCR a corrective action plan that meets appropriate legal standards, and it provides complainants with a faster resolution to the allegations they have brought to OCR. To initiate more formal enforcement proceedings in these cases, where recipients are willing to comply with the law, would only unreasonably and unnecessarily delay resolution of the cases. It should be understood that, in each of the 92 cases mentioned, corrective action was obtained without the necessity of moving to a more formal enforcement posture. Also, OCR monitors corrective action plans.

MAJOR FINDING

13. *There was consensus among the OCR regional office staff that few useful, substantive policy directives have been issued since 1981. When policies have been handed down, they have been disseminated often in the form of responses to draft LOFs, "marginal notes", or telephone calls from the National Office.* Rarely would there be policy directives disseminated nationwide and made applicable to all regions. A number of policy decisions have been circulated as drafts, but have not been set forth as official policy. Moreover, staff indicated that when policy decisions are made, they are often superficial and of little value. As a result, it was difficult to analyze complex and unique cases because there was little in writing and no predictability as to headquarters' decision in such cases.

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Since 1981, OCR has, in fact, issued in writing a large number of policy directives of general applicability on a range of substantive issues, which were disseminated to all of the regional offices. All policy of general applicability, including almost all case-specific policy, is disseminated to all of the regional offices. Policy has been codified in OCR's Policy Codification System (PCS). The PCS has been automated and serves as the authoritative reference for OCR policy on all issues. The PCS currently contains approximately 170 policy documents issued since April 1965. Approximately 150 of these documents were issued between 1981 and 1989.

In addition, OCR holds policy discussions with the regional offices through nationwide teleconferences. This is particularly effective, because it provides regional staff the opportunity to discuss the application of OCR policy to specific cases and to ask follow-up questions. OCR also circulated draft policy documents to regional offices for comments before developing the final document. Obtaining the insights of the regional managers and staff is a sound practice, since they are the ones who are most knowledgeable of how certain issues are addressed through the investigative process, what problems are occurring, and what specific guidance would be helpful.

OCR managers recognize the need to expand policy development activities and are taking necessary action to do so.

MAJOR FINDING

14. *According to the OCR field staff, when legal decisions are submitted to the field offices, and are motivated by other than legal considerations, they are never reduced to writing, according to OCR staff.* This *ad hoc* policy-making cannot be challenged, however, because there is nothing in writing to evidence such a policy.

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For at least the last 2½ years, all major legal or policy decisions have been put in writing and shared with the regional offices. Whenever legal guidance is forwarded to the regional offices, it is based on the statutes and regulations enforced by OCR and on applicable case law and, within those legal parameters, the policy decisions made by the Assistant Secretary.

MAJOR FINDING

15. *There was a clear perception among the regional office staff that certain issues were "off limits" and could not be investigated.* Most of the issues involved race discrimination. Among such issues were: discrimination involving disciplinary actions and the placement of black students in special education programs. Reportedly, the National Office would not approve of the investigation of such cases unless there were "horror stories," facts of such egregiousness that a finding other than discrimination was not possible.

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Except for those issues over which OCR has no jurisdiction, *no* issues are "off limits" to OCR. OCR investigated 80 percent of the complaints it received between FY 1981 and FY 1989 that involved black students in special education (Table 13) and 68 percent of the Title VI complaints it received citing disciplinary issues (Table 14). Those not investigated either were resolved through OCR's Early Complaint Resolution process or were closed administratively for valid reasons. OCR has no procedure that involves the headquarters office "approving" the investigation of complaints received by the regional offices. All issues that arise through the complaint process are treated equally, and investigations are carried out as necessary to resolve any issues raised by the complaint allegations.

In addition, between FY 1983 and FY 1989, OCR initiated 168 compliance reviews involving black students in special education and 34 compliance reviews involving Title VI disciplinary issues (Tables 15 and 16). For the FY 1990 compliance review cycle, the regional directors have been asked to place special emphasis on Title VI issues, and scheduled reviews include student discipline and placement of black students in special education programs.

MAJOR FINDING

16. *The National Office made it virtually impossible to find a violation of the civil rights laws because the standard of proof required to establish a violation was the stringent "intent" standard, which many regional office staff interviewed believed was not required by the courts.*

* * *

The regulations do not require proof of intent to discriminate to find a violation of Title VI. The regulations implementing Title VI prohibit recipients from using criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the programs. (See 34 C.F.R. Section 100.3(b)(2).) Similar language is found in the regulations implementing Title IX and Section 504. (See 34 C.F.R. Parts 106 and 104.) The regional offices have never been told that a violation of Title VI will be found only if the regional offices can obtain evidence of intent to discriminate. All evidence gathered in an investigation, including any evidence of an intent to discriminate, is evaluated under the pertinent regulations to determine whether the recipients are in compliance.

MAJOR FINDING

17. *While technical assistance (TA) has been the cornerstone of OCR's enforcement effort since 1981, the regional office staff expressed reservations concerning OCR's apparent use of TA as an alternative to compliance reviews and complaint investigations, and concerning OCR's failure to provide TA to beneficiaries of the civil rights laws,* in addition to the recipients of Federal financial assistance (i.e., the school districts/colleges).

……

The facts do not support this finding. While TA forms an integral part of OCR's compliance activities, it is not "the cornerstone of OCR's enforcement effort" nor has it been regarded as a substitute for critical investigative actions. Technical assistance is used by OCR to complement, not replace, its complaint and compliance review activities. OCR's TA program includes the provision of information and other services designed to inform beneficiaries of their rights and to assist recipients in voluntarily complying with the civil rights laws. Through TA, OCR is able to reach a far greater number of recipients than it could solely through complaint investigations and compliance reviews. For example, representatives from approximately 10,562 groups (e.g., state education agencies, local education agencies, postsecondary institutions, and beneficiary organizations) and 4,711 individual beneficiaries participated in the 3,176 TA activities that OCR conducted during FY 1989.

OCR's TA program includes the provision of information and other services designed to inform beneficiaries of their rights and to assist recipients in voluntarily complying with the civil rights laws. Much of the TA is provided entirely outside the context of a complaint investigation or compliance review.

MAJOR FINDING

18. *Staff acknowledged that OCR has little presence in the communities in which it operates, and is particularly unknown to the surrounding minority populations.* In one instance, Committee staff interviewed a member of the Seattle County Council regarding the well-publicized racial confrontations occurring within the local schools and found that this local community activist had no knowledge of OCR's existence.

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Notwithstanding the one example, the overall facts do not support this finding. OCR has substantially expanded its TA program in recent years to provide information and other services designed to inform beneficiaries of their rights and to assist recipients in voluntarily complying with the civil rights laws. Each regional office develops an annual Technical Assistance Plan designed to identify underserved populations and to encourage cooperative efforts with state and local education agencies, postsecondary institutions, and recipient and beneficiary organizations.

A considerable portion of OCR's TA is in the form of outreach. OCR conducted 586 TA outreach activities during FY 1989. Efforts were concentrated on larger, more complex activities that reached audiences with specific civil rights concerns. Representatives from approximately 10,562 groups, such as state and local education agencies, postsecondary institutions, and beneficiary organizations, and 4,711 individual beneficiaries participated in OCR's TA activities in FY 1989. In addition, OCR published and distributed several pamphlets explaining OCR's mission and its regulations and procedures. Spanish translations of these pamphlets have also been made available.

MAJOR FINDING

19. *OCR staff in a region with a large Hispanic population noted that none of the staff providing TA could speak Spanish and that there was little outreach to that community.*

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Every OCR regional office has the capability of providing TA to the Spanish-speaking community. OCR is not aware of any situations in which a Spanish-speaking person has contacted OCR and has been denied assistance because OCR staff did not have facility in Spanish. In addition, in recent years, OCR has published three of its TA pamphlets and publications in Spanish: "Education and Title VI"; "Title IX and Sex Discrimination"; and "The Rights of Individuals with Handicaps Under Federal Law." Thousands of copies of each of these pamphlets have been distributed to the regional offices for dissemination to the public. A number of other OCR TA pamphlets are currently being translated into Spanish for publication and dissemination. Furthermore, in the past 2 fiscal years OCR has conducted a variety of outreach activities directed toward language minority issues, including several conferences and workshops related to Hispanic interests.

MAJOR FINDING

20. *While monitoring of cases which have been closed with a "violations corrected" letter is essential to determining compliance, little substantive monitoring has actually taken place, particularly since the regional offices are not credited with conducting meaningful follow-up of such cases.* As a consequence, the burden for determining if the school districts or universities are fulfilling their promises to comply with the law lies with the complainants who must notify OCR of the recipients' inactivity.

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In planning for the FY 1990 work activities, OCR has identified compliance activities, including monitoring, as a high priority, second only to the processing of complaints. OCR's regional offices routinely monitor corrective action plans and maintain regional tracking systems. Recipients whose cases are closed based on a remedial action plan are required to submit monitoring reports to verify that the agreed upon actions have taken place (Table 17). OCR's substantive reviews of such reports are referred to as "desk audits." Where needed, an on-site visit to the recipient may occur. All monitoring reports (an average of approximately 140 are received each month) are audited by OCR staff.

OCR's Automated Case Management Information System (ACIMS) has been modified to collect historical data on each monitoring activity that is conducted so that OCR can track the actual number of monitoring desk audits completed each fiscal year. The addition to ACIMS of data on monitoring and other compliance activities will permit OCR to report its actual workload more fully and more accurately.

MAJOR FINDING

21. *Compared with its counterpart, the Office of Federal Contract Compliance Programs of the U.S. Department of Labor (OFCCP), OCR has conducted relatively few compliance reviews since 1981.* For example, in 1986, OFCCP conducted approximately 5,000 compliance reviews while OCR conducted 250. It is not clear why there is such a wide variance between the enforcement statistics of the two agencies whose FTEs and budgets are comparable. The numerous layers of review of work product at OCR and the voluminous investigative reports which must be prepared in each case may contribute to the relative paucity of compliance reviews at that agency.

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This finding is misleading. There are significant differences between OCR and OFCCP related to the statutes and authorities under which each agency operates. OFCCP requires contractors to develop and implement affirmative action plans for employment. OFCCP's compliance reviews consist of reviewing the content of existing affirmative action plans and their implementation, similar to OCR's monitoring of corrective action plans.

By contrast, OCR must determine *in every case it investigates* whether or not a recipient is complying with the appropriate civil rights statute with respect to the issues under investigation. The results of an OCR investigation must be a legally supportable finding, and, when a violation is found, OCR must negotiate a legally supportable remedy. If OCR cannot negotiate such a remedy, the agency is obligated to initiate formal enforcement proceedings, which require the in-depth preparation of witnesses, voluminous exhibits, and related activities. OCR does not have the discretion to make findings or require remedies unless these are supported by a thorough and careful investigation and corresponding legal review.

However, it is inappropriate to consider only compliance reviews, because in FY 1989, OCR received 2,827 complaints. OCR also conducted a wide variety of other compliance activities, including monitoring, eligibility determinations of applicants for grants under the Magnet Schools Assistance Program, state vocational education Methods of Administration reviews, and higher education desegregation reviews.

MAJOR FINDING

22. *OCR has effectively discontinued its Quality Assurance Program, which it transferred to the regional offices in 1985.* As a consequence, the agency has little information on which to determine consistency of policy application and quality of investigation.

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The facts do not support this finding. OCR has several procedures for ensuring both consistency of policy application and high quality investigations. Review at key phases of case processing, including review by the Branch Chief, Division Director, Staff Attorney, Chief Attorney, Deputy Regional Director (where applicable), and the Regional Director, ensures the substantive quality of decisions made during case processing. The small number of cases that could be viewed as problematic did not justify the expenditure of staff and fiscal resources required to operate a full-time headquarters quality assurance program. Also, a headquarters quality assurance program would identify problems only after a case is closed. OCR prefers to identify any potential problems while a case is being processed, so that there are no quality problems when the case is closed. Since OCR transferred the day-to-day quality assurance responsibilities to the regional offices in 1985, the number of cases being reviewed has increased substantially.

Periodically, OCR sends out specially constituted teams to check on the overall quality of work and any problems with regard to policy application. For example, in 1987, a special Quality Assurance Task Force visited all 10 regional offices to review the quality assurance programs and selected cases to ensure that the regions were appropriately and effectively implementing their programs. More recently, between the fall of 1988 and the spring of 1989, all 10 regional offices were again visited by a special Management Review Team that, among other review activities, evaluated the quality of each region's case processing activities and the regions' Quality Control/Case Assessment programs. Potential improvements to the quality assurance procedures are being developed.

MAJOR FINDING

23. *Formalized training at OCR was virtually disbanded in 1982 when the Denver Training Center was closed.* Staff expressed a clear and undeviating concern for the lack of classroom training, orientation programs for new employees, and refresher courses for more experienced investigators and lawyers.

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Staff development and training have become a high priority for OCR. Formal training was never discontinued. For the past 6 years, OCR has had a Training Division in headquarters that has provided substantive programmatic and technical assistance training through a variety of cost effective means. Since FY 1983, formal classroom training has been provided to a number of headquarters and regional staff on a variety of basic and specialized program issues and skills. (Examples include Title IX employment, basic investigation, legal reasoning and legal research for non-attorneys, vocational education Methods of Administration, mediation and negotiation skills, provision of special language services to limited English proficient children, administrative litigation, sexual harassment, and technical assistance approaches and techniques.) A wide range of programmatic and skills development training is carried out each year within each regional office and headquarters components. Headquarters staff attend management and technical courses through the Department's Horace Mann Learning Center and the Legal Education Institute of the Department of Justice. OCR has also provided training to regional and headquarters offices in computer and computer-related areas through on-site training and the development of self-study guides.

Many regional offices have the program expertise and capability to provide their own training, but they often have difficulty in organizing and implementing a sustained program because of the heavy workload. OCR recognizes that additional, substantive programmatic, management, and skill development training is critically important. Staff development is one of OCR's highest priorities for FY 1990.

MAJOR FINDING

24. *OCR's computerized data management system was rife with problems, making it difficult for Committee staff to fully analyze key aspects of the agency's performance.* Moreover, because of the inadequacies of the data gathered during the pre-1983 period, staff could not conduct proper trend analyses. More seriously, the computerized system to track cases referred to headquarters for enforcement is so unreliable that agency officials advised Committee staff not to use it. Also, data concerning monitoring reviews is not systematically gathered or maintained by headquarters.

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This finding is partially correct. Pre-FY 1983 data gathering was inadequate. However, these problems have been corrected since 1983. The computerized system to track cases referred to headquarters for enforcement was found to be inadequate and was replaced by data elements in the Automated Case Information Management System (ACIMS), which have proved to be reliable. OCR has had in place for several years an automated system (ACIMS) that provides the Assistant Secretary with up-to-date, accurate information on regional case activity. Effective October 1, 1989, several new data elements were added to ACIMS that now permit OCR to track fully all case monitoring activities, as well as such compliance activities as evaluations of states' vocational education Methods of Administration plans and the funding eligibility determinations OCR makes under the Magnet Schools Assistance Program. A computer program that identifies possible data entry errors has been developed and implemented.

OCR has focused on the development of a new system, the Automated Information Management System (AIMS), rather than refinement of the existing Automated Case Information Management System (ACIMS). The new system will include additional data elements and a number of controls designed to improve the accuracy of data entered by regional staff.

Section III. Responses to Recommendations

OCR's response to each of the Recommendations in the Report is provided in this section.

RECOMMENDATION

1. OCR should conduct compliance reviews of systemic discrimination issues, issues not raised in complaints, and issues that will have broad impact. Moreover, in keeping with its original mandate, OCR should conduct more compliance reviews regarding race and national origin issues, without diminishing its emphases in other areas.

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OCR does conduct a few reviews of systemic discrimination. A current example is the broad-based review of admissions to the UCLA undergraduate and graduate programs. Such reviews, however, are extremely labor-intensive and very expensive. For example, a 3-week on-site review of UCLA cost the agency $25,000 dollars in per diem and travel costs alone.

On August 30, 1989, OCR issued "Additional Guidance for the Selection of Sites for Compliance Reviews" to assist the regional offices in effectively planning and carrying out substantive compliance reviews addressing a broad range of issues. The memorandum made it clear that the regions were to conduct compliance reviews that have broad effect by conducting multi-issue reviews and reviews on issues that have not been addressed recently by compliance reviews.

The guidance noted that "Resources should be targeted on problems that appear to be serious or national in scope *and that may not have been raised by complaints*" [emphasis added]. The Acting Assistant Secretary also directed the regional offices to submit, for the first time, annual Compliance Review Plans that identify the issues the regions intend to address in compliance reviews during FY 1990. On the basis of the information submitted in those plans, it is clear that the regions are planning to increase substantially the percentage of Title VI reviews that they will be conducting in FY 1990. However, if complaint receipts continue at their current very high rate, these plans will have to be re-examined.

It should be noted that many Section 504 and Title IX reviews result in corrective action that affects large numbers of minority students. For example, OCR's enforcement action against the Chicago Public Schools under Section 504 resulted in a corrective action plan that assisted the high percentage of minority students, as well as nonminority students, in the District's special education program.

RECOMMENDATION

2. The agency should review its work product requirements and multiple layers of approval of work so that OCR may more efficiently and effectively increase its compliance review work load and conduct complaint investigations *without compromising quality.*

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OCR's Management Review Team considered these issues in some depth in all 10 regional offices, and follow-up discussions on these issues were held with senior regional managers. While some changes can be made to internal case processing procedures that will reduce some of the workload burden for the regional offices, the nature of the investigative process, the complexity and sensitivity of the issues that arise in educational institutions, and the legal standards OCR must meet to make a finding under any of its statutes and regulations preclude the agency from adopting certain shortcuts that may be appropriate for other agencies operating under different statutes and with different types of recipients.

The Management Review Team found that OCR's regional offices, on the whole, conduct thorough investigations with well-supported findings. The high quality of the work products produced by regional office staff is directly attributable to the various levels of review by regional managers, including the Chief Civil Rights Attorneys.

OCR's Investigation Procedures Manual (IPM) is being revised to streamline procedures without affecting the quality of the work products. These types of management activities will help improve efficiency, but they will not result in a substantial increase in the numbers of compliance reviews undertaken. Almost none of OCR's case investigations can be handled without an in-depth review of a range of evidence. The fact that OCR has been so successful in its negotiation of corrective action plans where findings have been made is an indication that recipients generally believe the investigations to be thorough and not easily subject to challenge.

RECOMMENDATION

3. The Department of Education should establish a centralized, comprehensive and uniform computerized recordkeeping system of all Federal funds awarded by the Department to educational institutions.

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The Department of Education maintains Federal financial assistance information in two primary recordkeeping systems that assist OCR staff in establishing jurisdiction. Information on direct grants is maintained in the Federal Assistance Awards Data System (FAADS). Information on state-administered funds to recipients is part of the General Education Provisions Act (GEPA) Section 406A data collection, but the data available to OCR are at least a year old. In addition, OCR has access to the Office of the Inspector General's Audit Universe file, which also contains information on Federal financial assistance provided by the Department to recipients. OCR headquarters has provided guidance to the regional offices on obtaining Federal funding information.

The requirement to identify program-specific funding under the constraints of the *Grove City* decision ended with the passage of the 1988 Civil Rights Restoration Act, which has virtually eliminated the difficulties encountered in establishing jurisdiction while the *Grove City* decision was in effect.

RECOMMENDATION

4. OCR should establish time frames for case processing and publish them in the *Federal Register* for notice and comment. Ample flexibility should be included in the time frames for the regional staff to investigate systemic, complex, novel or multi-issue cases.

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With regard to complaints, OCR's current case processing time frames are the same as the time frames contained in the former *Adams* order. Up to 20 percent of the complaints received in a given fiscal year on a national basis may be excepted from the case processing time frames.

On August 30, 1989, OCR Headquarters advised the OCR Regional Directors that their FY 1990 Compliance Review Plans would serve as the basis for negotiating with headquarters time frame extensions that may be necessary to complete large, complex, and/or multi-issue compliance reviews. Each region will be permitted to negotiate extended time frames for approximately 10 percent of the reviews it plans to conduct during the fiscal year.

OCR is about to make minor modifications to the time frames to provide regional managers with additional flexibility in processing cases.

RECOMMENDATION

5. OCR should require that time frames for case processing be based upon business days and not calendar days.

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The need for additional time for regional staff to investigate cases and to negotiate case settlements was highlighted by the Management Review Team. It also was discussed in depth by the Regional Directors at OCR's recent management Roundtable. As noted earlier, OCR is about to make minor modifications to the time frames to provide regional managers with additional flexibility in processing cases.

RECOMMENDATION

5. OCR should require that time frames for case processing be based upon business days and not calendar days.

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The need for additional time for regional staff to investigate cases and to negotiate case settlements was highlighted by the Management Review Team. It also was discussed in depth by the Regional Directors at OCR's recent management Roundtable. As noted earlier, OCR is about to modify the time frames to provide regional managers with additional time to process cases.

RECOMMENDATION

6. "Violations Corrected" Letters of Findings (LOFs) should be discontinued.

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OCR respectfully disagrees with this recommendation. The pre-LOF negotiations process is an extremely timely and effective means of securing voluntary compliance from recipients who have been found to be in violation of the civil rights laws. The procedure is fully consistent with OCR's statutory mandate: to ensure that recipients comply with the civil rights laws we enforce. The pre-LOF negotiation process and violations corrected LOFs are also consistent with the fact that OCR is *required* to seek voluntary compliance under each of its jurisdictions. It should be understood that a violations corrected LOF ***states that a violation has occurred*** and that appropriate remedial action to correct the cited violation has been agreed upon by OCR and the recipient. The corrective action is specified in the LOF, and implementation of the corrective action is monitored by OCR.

RECOMMENDATION

7. Notwithstanding OCR's mandate to achieve voluntary compliance, regional office staff must be permitted to issue violation LOFs without the compulsion to settle a complaint or resolve a compliance review when there is little likelihood of settlement or when a violation LOF will either hasten the negotiation process or precede enforcement action.

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OCR is reviewing its internal procedures to make this process more efficient.

RECOMMENDATION

8. Policy directives must be distributed on a timely basis and must be made available to all of the regional office staff and to recipients and the public at large. Such policies must be consistent with current law.

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All of OCR's policies are consistent with current law. Since 1981, OCR has, in fact, issued in writing a large number of policy directives of general applicability on a range of substantive issues, which were disseminated to all of the regional offices. All policy of general applicability, including almost all case-specific policy, is disseminated to all of the regional offices. Policy has been codified in OCR's Policy Codification System (PCS). The PCS has been automated and serves as the authoritative reference for OCR policy on all issues. The PCS currently contains approximately 170 policy documents issued since April 1965. Approximately 150 of these documents were issued between 1981 and 1989.

In addition, OCR holds policy discussions with the regional offices through nationwide teleconferences. This is particularly effective, because it provides regional staff the opportunity to discuss the application of OCR policy to specific cases and to ask follow-up questions. OCR also circulated draft policy documents to regional offices for comments before developing the final document. Obtaining the insights of the regional managers and staff is a sound practice, since they are the ones who are most knowledgeable of how certain issues are addressed through the investigative process, what problems are occurring, and what specific guidance would be helpful.

All of OCR's policy documents contained in the PCS are available upon request to recipients and the public at large. OCR intends to explore other methods for publishing and disseminating its policy guidance.

OCR managers recognize the need to expand policy development activities and are taking necessary action to do so.

RECOMMENDATION

9. Technical assistance must not be used as a substitute for complaint investigations and compliance reviews and should be provided to both recipients and beneficiaries. Staff providing TA should not also be responsible for enforcement.

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OCR processes *all* complaints that it receives; technical assistance is *never* used as an alternative to the conduct of a complaint investigation. Furthermore, OCR conducts a compliance review whenever it receives information about a recipient indicating a possible failure to comply with the civil rights laws.

Technical assistance is used by OCR to complement, not replace, its complaint and compliance review activities. OCR's TA program includes the provision of information and other services designed to inform beneficiaries of their rights and to assist recipients in voluntarily complying with the civil rights laws. Through TA, OCR is able to reach a far greater number of recipients than it could solely through complaint investigations and compliance reviews. For example, representatives from approximately 10,562 groups (e.g., state education agencies, local education agencies, postsecondary institutions, and beneficiary organizations) and 4,711 individual beneficiaries participated in the 3,176 TA activities that OCR conducted during FY 1989.

OCR has found that TA can be an effective tool in addressing recurring civil rights problems. For example, at the same time that OCR was investigating a large number of complaints from a single complainant alleging discrimination in the administration of student health insurance plans, we conducted TA meetings with representatives of postsecondary recipient organizations and the major insurance carriers to advise them of their civil rights responsibilities in providing student health insurance. As a result of these efforts, this civil rights problem has been virtually eradicated nationwide.

Some regional offices have certain staff that only provide TA, while other regions have staff that conduct investigations as well as provide TA. Since provision of TA involves disseminating information regarding OCR's compliance and enforcement program, we do not see a conflict between both conducting investigations and providing TA.

RECOMMENDATION

10. Monitoring must be considered an essential part of OCR's enforcement effort. Staff must be given adequate time to perform monitoring activities.

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We agree and are so doing. Recipients whose cases are closed based on a remedial action plan are required to submit monitoring reports to verify that the agreed upon actions have taken place. OCR's substantive reviews of such reports are referred to as "desk audits." On-site monitoring is carried out when needed. All monitoring reports (an average of approximately 140 are received each month) are audited by OCR staff. OCR's Automated Case Management Information System (ACIMS) has been modified to collect historical data on each monitoring activity that is conducted so that OCR can track the actual number of monitoring desk audits completed each fiscal year. The addition to ACIMS of data on these and other compliance activities will permit OCR to report its actual workload more fully and more accurately. In planning for the FY 1990 work activities, OCR has identified compliance activities, including monitoring, as a high priority, second only to the processing of complaints.

RECOMMENDATION

11. The Quality Assurance Program must be returned to the OCR National Office and restored to its previous function of assessing the quality of staff investigations and assuring consistency of policy implementation.

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OCR respectfully disagrees with this recommendation. OCR has several procedures that ensure consistent application of policy and quality investigations. Review at key phases of case processing, including review by the Branch Chief, Division Director, Staff Attorney, Chief Attorney, Deputy Regional Director (where applicable), and the Regional Director, ensures the substantive quality of decisions made during case processing. The small number of cases that could be viewed as problematic did not justify the expenditure of staff and fiscal resources required to operate a full-time headquarters quality assurance program. Also, a headquarters quality assurance program would identify problems only after a case is closed. OCR prefers to identify any potential problems while a case is being processed, so that there are no quality problems when the case is closed. Since OCR transferred the day-to-day quality assurance responsibilities to the regional offices in 1985, the number of cases being reviewed has increased substantially.

Periodically, OCR sends out specially constituted teams to check on the overall quality of work and to identify any problems with regard to policy application. For example, in 1987, a special Quality Assurance Task Force visited all 10 regional offices to review the quality assurance programs and selected cases to ensure that the regions were appropriately and effectively implementing their programs. More recently, between the fall of 1988 and the spring of 1989, all 10 regional offices were again visited by a special Management Review Team that, among other review activities, evaluated the quality of each region's case processing activities and the regions' Quality Control/Case Assessment programs. Potential improvements to the quality assurance procedures are being developed.

RECOMMENDATION

12. State higher education systems which were formerly *de jure* segregated systems must not be evaluated by a "good faith" standard, but must be held responsible for totally eliminating the vestiges of discrimination, "root and branch."

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In evaluating the present Title VI compliance of formerly *de jure* segregated systems of higher education, OCR has *not* used the so-called "good faith" standard. The standard applied by OCR is whether a state system, over the 5-year duration of its desegregation effort, has implemented measures that effectively served each overall objective of both the original plan and the specific measures set forth therein. OCR has advised each state with an OCR approved desegregation plan that its higher education system will be deemed to be in compliance with Title VI only if the facts demonstrate that significant actions have been taken by the system to achieve the objectives intended to be carried out by each measure set forth in its plan. Under OCR's procedures, the actual actions of the state system's leadership and individual institutions -- and not the subjective mind set regarding "good faith" -- determine whether a system is deemed to have satisfied its desegregation obligations under Title VI. When a system's actions in a particular area are deemed to be deficient, OCR notifies the system of that fact and requires the system to implement promptly the original plan measure or an equivalent measure.

RECOMMENDATION

13. Formalized training courses, including those provided at the Denver Training Center which was closed in 1982, should be reinstituted.

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Staff development and training have become a high priority for OCR. Formal training was never discontinued. For the past 6 years, OCR has had a Training Division in headquarters that has provided substantive programmatic and technical assistance training through a variety of cost effective means. Since FY 1983, formal classroom training has been provided to a number of headquarters and regional staff on a variety of basic and specialized program issues and skills. (Examples include Title IX employment, basic investigation, legal reasoning and legal research for non-attorneys, vocational education Methods of Administration, mediation and negotiation skills, provision of special language services to limited English proficient children, administrative litigation, sexual harassment, and technical assistance approaches and techniques.) A wide range of programmatic and skills development training is carried out each year within each regional office and headquarters components. Headquarters staff attend management and technical courses through the Department's Horace Mann Learning Center and the Legal Education Institute of the Department of Justice. OCR has also provided training to regional and headquarters offices in computer and computer-related areas through on-site training and the development of self-study guides.

Many regional offices have the program expertise and capability to provide their own training, but they often have difficulty in organizing and implementing a sustained program because of the heavy workload. Nevertheless, OCR recognizes that additional, substantive programmatic, management, and skill development training is critically important. Staff development is one of OCR's highest priorities for FY 1990.

RECOMMENDATION

14. OCR staff should be restored to its 1981 levels as quickly as possible, and computer and other equipment needs should be communicated to the Congress in time for consideration of the agency's 1990 appropriation.

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As a follow-up to the Management Review process, OCR initiated extensive planning and assessment activities regarding the workload of the regional and headquarters offices and the allocation of existing staff resources in OCR. This process will be used to determine whether OCR-wide resources are being used in the most effective way, given the regional workload priorities. These planning activities need to be carried out in depth and completed before any determination can be made as to whether or how many additional staff OCR may need.

With regard to computer equipment, steps have been taken to purchase computers for word processing for several regional offices.

RECOMMENDATION

15. OCR should consider amending the Title VI regulations to provide for specific time frames for records retention; full relief for victims of discrimination; a requirement which mandates that recipients of Federal financial assistance post notices in conspicuous areas that nondiscrimination is the law; authority for the issuance of subpoenas for the compulsion of necessary data; and a "reasonable cause standard" on which to determine compliance.

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OCR will consider whether it is appropriate to make any revisions to the Title VI regulations consistent with the Report's recommendations.

RECOMMENDATION

16. OCR should conduct a detailed analysis of its data needs and capabilities for data gathering and monitoring. It should also assess the adequacy of its computer system, particularly regarding the communication linkages between the regional offices and headquarters.

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The Office for Civil Rights completed a comprehensive review of its data needs in FY 1986 in the development of a new Automated Information Management System (AIMS). This system was developed in close cooperation with the Department's Information Technology Service (renamed Office of Information Resources Management), which has general oversight over the development of major ADP acquisitions within the Department. Delay in implementation of AIMS resulted primarily from the need to direct fiscal and staff resources to regional compliance activities.

With regard to the adequacy of OCR's telecommunication linkages, recently the Department, through its Office of Information Resources Management, negotiated a contract with Boeing Computer Services. System performance has greatly improved under this new contractor. Telecommunications problems are quickly identified and resolved. Telecommunications problems will be further ameliorated by the advent of FTS 2000.

In FY 1987, 99 computer systems were acquired by OCR. In FY 1988, OCR completed an Office Automation Requirement Definition and Plan that detailed OCR's need to make improvements in its office automation environment and capabilities. Because of budgetary constraints, OCR has not completely implemented the plan. However, during FY 1989, OCR purchased an additional 56 PCs and associated technology. OCR also made significant communications improvements between regional offices and Headquarters by implementing the Comprehensive Electronic Office (CEO) System in FY 1989.

RECOMMENDATION

17. The Education and Labor Committee should consider requesting a General Accounting Office audit of the issues raised in this report, particularly regarding policy dissemination and implementation.

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The General Accounting Office began an audit of OCR on December 5, 1989.

RECOMMENDATION

18. OCR should issue age discrimination regulations by the end of FY 1989.

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OCR has submitted redrafted regulations for implementing the Age Discrimination Act to the Departmental clearance process. Upon approval by the Secretary, these regulations will be submitted to the Secretary of Health and Human Services and, subsequently, to the Office of Management and Budget.

Table 1

Complaint Receipts Citing Each Basis Alone by Complaint Type, FY 1981 through FY 1989

Basis	Regular				Single Complainant					
	New		Refiled		New		Refiled		Total	
	N	%	N	%	N	%	N	%	N	%
Handicap	10,110	51%	41	42%	100	7%	1	0%	10,261	47%
Race/National Origin	4,236	21%	21	22%	3	0%	0	0%	4,260	20%
Sex	1,703	9%	17	18%	966	63%	424	98%	3,110	14%
Age	425	2%	4	4%	46	3%	0	0%	475	2%
Other	1,294	7%	1	1%	2	0%	0	0%	1,297	6%
Multiple	2,007	10%	13	13%	403	26%	6	1%	2,429	11%
Total	19,775	100%	97	100%	1,529	100%	431	100%	21,832	100%

Note: After passage of the Civil Rights Restoration Act (CRRA), complainants were give the opportunity to have complaints which were closed or narrowed due to Grove City re-examined. OCR staff re-opened 528 of these complaints, which were referred to as "refiled" complaints. Of the 528 refiled complaints, 431 were filed by a single complainant who also filed 1,466 new complaints.

Table 2

Complaints Received Citing Each Basis Alone or in Combination with Another Basis, FY 1981 through FY 1989

Basis	Number	Percent
Handicap	11,625	53%
Sex	4,638	21%
Race/National Origin	5,945	27%
Age	1,414	6%
Total Receipts	21,832	*

*Note: The percentages total more than 100%, because some complaints alleged discrimination on more than one basis (e.g., race and handicap).

Table 3

Complaints Received and Subsequently Investigated, by Basis, FY 1981 through FY 1989

Basis	Number Received	Percent of Receipts	Number Investigated*	Percent Investigated*
Handicap	10,261	47%	6,374	62%
Race/National Origin	4,260	20%	2,157	51%
Sex	3,110	14%	2,279	73%
Age	475	2%	108	23%
Other	1,297	6%	48	4%
Multiple	2,429	11%	1,316	54%
Total	21,832	100%	12,282	56%

*Note : Incomplete data, do not include some cases received late in FY 1989.

Table 4

Complaint LOFs by Basis, for All Complaints Received During FY 1981 through FY 1989

Basis	Investigations Started	LOFs Issued	No Violation		Violation Cited	
			N	%	N	%
Handicap	6,374	5,039	2,750	55%	289	45%
Race/National Origin	2,157	1,684	1,415	84%	269	16%
Sex	2,279	1,554	648	42%	906	58%
Age	108	93	80	86%	13	14%
Other	48	38	30	79%	8	21%
Multiple	1,316	1,025	607	59%	418	41%
Total	12,282	9,435	3,530	59%	3,903	41%

Table 5
Compliance Review Starts, FY 1981 through FY 1989, by FY

Fiscal Year	Number of Starts
1981	138
1982	208
1983	287
1984	220
1985	288
1986	197
1987	240
1988	247
1989	138
Total	1,963

Table 6
Compliance Review Starts Citing Each Basis Alone, FY 1983 through FY 1989

Basis	Number	Percent
Handicap	578	36%
Sex	339	21%
Race and/or National Origin	380	23%
Multiple	320	20%
Total Starts	1,617	100%

Table 7
Compliance Review Starts Citing Each Basis Alone or in Combination with Another Basis, FY 1983 through FY 1989

Basis	Number	Percent
Handicap	848	52%
Sex	553	34%
Race and/or National Origin	654	40%
Total Starts	1,617	*

*Note: The percentages total more than 100% because some compliance reviews cited discrimination on more than one basis (e.g., race and handicap).

Table 8

Complaint and Compliance Review Letters of Findings (LOFs)

	Complaints (FY 1981-FY 1989)		Compliance Reviews (FY 1983-FY 1989)	
	N	%	N	%
No Violation	5,530	59%	448	28%
Violation Cited	3,903	41%	1,132	72%
Total LOFs	9,433	100%	1,580	100%

Table 9

Combined Complaint and Review Time Frame

Compliance Rates, FY 1984 Through 1989

Ficsal Year	Number of Due Dates	Percent Met
1984	3,645	78%
1985	3,986	87%
1986	5,167	92%
1987	3,832	92%
1988	5,487	95%
1989	6,249	95%

Table 10

Complaints Received Which Were Closed Due to Withdrawal without Benefit to the Complainant, FY 1981 through FY 1989

Fiscal Year	Total Receipts	Number Closed Due to Withdrawal without Benefit	Percent Closed Due to Withdrawal without Benefit
1981	2,889	119	4%
1982	1,840	75	4%
1983	1,946	87	4%
1984	1,934	115	6%
1985	2,240	77	3%
1986	2,648	108	4%
1987	1,976	92	5%
1988	3,532	107	3%
1989	2,827	75*	3%*
Total	21,832	855*	4%*

*Note: Incomplete data; do not include some cases received late in FY 1989.

Table 11

Complaints Received Which Were Closed Due to Withdrawal with Benefit to the Complainant, FY 1981 through FY 1989

Fiscal Year	Total Receipts	Number Closed Due to Withdrawal with Benefit*	Percent Closed Due to Withdrawal with Benefit*
1981	2,889	189	7%
1982	1,840	182	10%
1983	1,946	219	11%
1984	1,934	267	14%
1985	2,240	293	13%
1986	2,648	272	10%
1987	1,976	251	13%
1988	3,532	319	9%
1989	2,827	309	11%
Total	21,832	2301	11%

*Note: Incomplete data; do not include some cases received late in FY 1989.

Table 12

No Jurisdiction (NJ) Complaint Closures for Complaints and Postsecondary (PS) Complaints Received, FY 1984 through FY 1989

	Total			Postsecondary		
Fiscal Year	Receipts	NJ Closures* N	NJ Closures* %	Receipts	NJ Closures* N	NJ Closures* %
1981	2,889	649	22%	694	117	17%
1982	1,840	335	18%	486	96	20%
1983	1,946	319	16%	508	85	17%
1984	1,934	366	19%	549	93	17%
1985	2,240	498	22%	717	233	32%
1986	2,648	845	32%	1,059	520	49%
1987	1,976	506	26%	515	184	36%
1988	3,532	698	20%	1,885	416	22%
1989	2,827	438*	15%*	757	103*	14%*
Total	21,832	4,654	21%	7,170	1,847	26%

*Note: Incomplete data; do not include some cases received late in FY 1989.

Table 13

Complaints Involving Black Students in Special Education

Fiscal Year	Receipts	Number Investigated	Percent Investigated
1981	27	25	93%
1982	14	14	100%
1983	13	11	85%
1984	11	10	91%
1985	22	18	82%
1986	19	16	84%
1987	18	14	78%
1988	18	15	83%
1989	26	11*	42%*
Total	168	134*	80%*

*Note: Incomplete data; do not include some cases received late in FY 1989.

Table 14

Complaints Citing Title VI Disciplinary Issues

Fiscal Year	Receipts	Number Investigated	Percent Investigated
1981	119	103	87%
1982	83	65	78%
1983	68	52	76%
1984	70	45	64%
1985	99	57	58%
1986	94	58	62%
1987	88	57	65%
1988	125	76	61%
1989	123	78*	63%*
Total	869	591*	68%*

*Note: Incomplete data; do not include some cases received late in FY 1989.

Table 15

Compliance Reviews Involving Black Students in Special Education

Fiscal Year	Starts	Investigated	Percent Investigated
1983	18	18	100%
1984	8	8	100%
1985	10	10	100%
1986	10	10	100%
1987	4	4	100%
1988	12	12	100%
1989	2	2	100%
Total	168	168	100%

Table 16

Compliance Reviews Involving Title VI Discipline Issues

Fiscal Year	Starts	Investigated	Percent Investigated
1983	13	13	100%
1984	10	10	100%
1985	2	2	100%
1986	1	1	100%
1987	0	0	100%
1988	3	3	100%
1989	5	5	100%
Total	34	34	100%

Table 17

Closures Requiring Monitoring

Fiscal Year	Complaints			Compliance Reviews		
	Number of Closures	Number Requiring Monitoring	Percent Requiring Monitoring	Number of Closures	Number Requiring Monitoring	Percent Requiring Monitoring
1981	2,889	64	2%	na	na	na
1982	1,840	90	5%	na	na	na
1983	1,946	212	11%	287	123	43%
1984	1,934	210	11%	220	124	56%
1985	2.240	305	14%	288	186	65%
1986	2,648	443	17%	197	126	64%
1987	1,976	239	12%	240	166	69%
1988	3,532	815	23%	247	163	66%
1989	2,827	256	9%	138	78	56%
Total	21,832	2,634	12%	1,617	966	60%